(37)

No. 99-5-CFX Title: United States, Petitioner
v.
Antonio J. Morrison, et al.

Docketed: June 25, 1999 Court: United States Court of Appeals for the Fourth Circuit

Vide:
99-29

Entry	Date	Proceedings and Orders
	May 21 1999	Application (98A977) to extend the time to file a petition for a writ of certiorari from June 3, 1999 to June 22, 1999, submitted to The Chief Justice.
	May 25 1999	Application (98A977) granted by the Chief Justice extending the time to file until June 30, 1999.
	Jun 25 1999	Petition for writ of certiorari filed. (Response due August 20, 1999)
	Jun 25 1999	40 copies ea of 2 volumes of appendices to petition for a writ of certiorari filed.
	Jul 22 1999	Order extending time to file response to petition until August 20, 1999.
	Aug 19 1999	Motion of Pacific Legal Foundation for leave to file a brief as amicus curiae filed.
	Aug 19 1999	Brief amici curiae of Arizona, et al. filed.
	Aug 20 1999	Brief of respondents Antonio Morrison and James Crawford in opposition filed. VIDED.
	Aug 31 1999	Reply brief of petitioner Christy Brzonkala filed. VIDED.
	Sep 1 1999	DISTRIBUTED. September 27, 1999
	Sep 3 1999	Reply brief of petitioner United States filed.
	Sep 28 1999	Petition GRANTED. The petitions for writs of certiorari are granted. The cases are consolidated and a total of one hour is allotted for oral argument. The briefs of petitioners are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, November 12, 1999. The briefs of respondents are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, December 13, 1999. Reply briefs, if any, are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, December 30, 1999. Rule 29.2 does not apply. SET FOR ARGUMENT January 11, 2000.
		**********
	Oct 4 1999	Motion of Pacific Legal Foundation for leave to file a brief as amicus curiae GRANTED.
	Oct 7 1999	Letter from Commonwealth of Virginia waiving the right to file a respondent's brief on the merits.
	Nov 10 1999	Joint appendix filed. VIDED.
	Nov 10 1999	Motion of Association of the Bar of the City of New York for leave to file a brief as amicus curiae filed.
	Nov 12 1999	Brief of petitioner Christy Brzonkala filed. VIDED.
	Nov 12 1999	Brief of petitioner United States filed. VIDED.
	Nov 12 1999	Motion of Association of Trial Lawyers of America for leave to file a brief as amicus curiae filed.

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No. 99-5-CFX

Entry	Date	Proceedings and Orders
	Nov 12 1999	Motion of Equal Rights Advocates, et al. for leave to file a brief as amici curiae filed.
	Nov 12 1999	Brief amici curiae of Law Professors Kathryn Abrams, et al. filed. VIDED.
	Nov 12 1999	Brief amici curiae of Arizona, et al. filed. VIDED.
	Nov 12 1999	Brief amici curiae of National Network to End Domestic Violence, et al. filed. VIDED.
	Nov 12 1999	Brief amicus curiae of Joseph R. Biden, Jr. filed. VIDED.
	Nov 12 1999	Brief amici curiae of AYUDA, et al. filed. VIDED.
	Nov 12 1999	Brief amici curiae of International Law Scholars and Human Rights Experts filed. VIDED.
	Nov 12 1999	LODGING consisting of 20 certified copies of a conviction and Sentencing Order In Virginia v. James Crawford submitted by counsel for the petitioner.
	Nov 12 1999	Motion of Lawyers' Committee for Civil Rights Under Law, et al. for leave to file a brief as amici curiae filed.
	Nov 15 1999	Response of respondent Crawford to motions for leave to file amici briefs filed.
	Nov 18 1999	Record filed.
	Nov 19 1999	CIRCULATED.
	Nov 26 1999	Motion of Solicitor General for divided argument filed.
	Nov 29 1999	Record filed.
	Dec 2 1999	Motion of the Solicitor General for divided argument DISTRIBUTED.
	Dec 2 1999	Motion of Association of the Bar of New York for leave to file a brief as amicus curiae DISTRIBUTED.
	Dec 2 1999	Motion of Lawyers' Committee for Civil Rights Under Law, et al. for leave to file a brief as amici curiae DISTRIBUTED.
	Dec 2 1999	Motion of Equal Rights Advocates, et al. for leave to file a brief as amici curiae DISTRIBUTED.
	Dec 2 1999	Motion of Association of Trial Lawyers of America for leave to file a brief as amicus curiae DISTRIBUTED.
	Dec 6 1999	Motion of Association of the Bar of the City of New York for leave to file a brief as amicus curiae GRANTED.
	Dec 6 1999	Motion of Association of Trial Lawyers of America for leave to file a brief as amicus curiae GRANTED.
	Dec 6 1999	Motion of Equal Rights Advocates, et al. for leave to file a brief as amici curiae GRANTED.
	Dec 6 1999	Motion of Lawyers' Committee for Civil Rights Under Law, et al. for leave to file a brief as amici curiae GRANTED.
	Dec 6 1999	Motion of Solicitor General for divided argument GRANTED.
	Dec 10 1999	Brief amicus curiae of National Association of Criminal Defense Lawyers filed. VIDED.
	Dec 10 1999	Brief amicus curiae of Pacific Legal Foundation filed. VIDED.
	Dec 10 1999	Brief amici curiae of Institute for Justice and the Cato Institute filed. VIDED.
	Dec 13 1999	Brief of respondent James LaDale Crawford filed. VIDED.

No. 99-5-CFX

Entry	Date	Proceedings and Orders
	Dec 13 1999	Brief of respondent Antonio J. Morrison filed. VIDED.
	Dec 13 1999	LODGING consisting of twenty copies of supplemental material submitted by counsel for Morrison and distributed.
	Dec 13 1999	Brief amicus curiae of Rita Gluzman filed. VIDED.
	Dec 13 1999	LODGING of twenty copies of two letter sent by Dept. of Justice to the Senate submitted by counsel for Gluzman and distributed
	Dec 13 1999	Brief amicus curiae of Clarendon Foundation filed. VIDED.
	Dec 13 1999	Brief amicus curiae of Independent Women's Forum filed. VIDED.
	Dec 13 1999	Brief amicus curiae of Claremont Institute Center for Constitutional Jurisprudence filed. VIDED.
	Dec 13 1999	Brief amicus curiae of Eagle Forum Education & Legal Defense Fund filed. VIDED.
	Dec 13 1999	Brief amicus curiae of Center for Original Intent of the Constitution filed. VIDED.
	Dec 13 1999	Brief amicus curiae of Women's Freedom Network (TBReprinted) filed. VIDED.
	Dec 30 1999	Reply brief of petitioner Christy Brzonkala filed. VIDED.
	Dec 30 1999	Reply brief of petitioner United States filed. VIDED.
	Jan 11 2000	ARGUED.

Supreme Court, U.S.
FILED

(1) 99 5 JUN 25 1999

No. OFFICE OF THE CLERK

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ANTONIO J. MORRISON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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37 pp

QUESTIONS PRESENTED

1. Whether 42 U.S.C. 13981, the provision of the Violence Against Women Act of 1994 that creates a private right of action for victims of gender-motivated violence, is a valid exercise of Congress's power under the Commerce Clause of the Constitution.

2. Whether 42 U.S.C. 13981 is a valid exercise of Congress's power under the Enforcement Clause of the Fourteenth Amendment to the Constitution.

PARTIES TO THE PROCEEDING

Petitioner is the United States of America, which intervened in the district court to defend the constitutionality of 42 U.S.C. 13981. Christy Brzonkala was the plaintiff in the district court and an appellant in the court of appeals.

Respondents are Antonio J. Morrison and James Landale Crawford. The Virginia Polytechnic Institute and State University, Cornell D. Brown, and William E. Landsidle, in his capacity as Comptroller of the Commonwealth of Virginia, were defendants/appellees below.

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In the Supreme Court of the United States

No.

UNITED STATES OF AMERICA, PETITIONER

v.

ANTONIO J. MORRISON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals sitting en banc (App. 1a-281a) is reported at 169 F.3d 820. The earlier opinion of a panel of that court (App. 282a-349a) is reported at 132 F.3d 949. The opinion of the district court (App. 350a-403a) is reported at 935 F. Supp. 779.

JURISDICTION

The judgment of the court of appeals was entered on March 5, 1999. On May 25, 1999, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including June 30, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3, provides: "The Congress shall have Power * * * To regulate Commerce * * * among the several States."

2. The Equal Protection Clause of Section 1 of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." Section 5 of the Fourteenth Amendment provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

3. The civil rights provision of the Violence Against Women Act of 1994, 42 U.S.C. 13981, is reprinted in an appendix to this petition (App. 404a-406a).

STATEMENT

This case presents a constitutional challenge to 42 U.S.C. 13981, the provision of the Violence Against Women Act of 1994 (VAWA) that gives victims of gender-motivated violence a private right of action against its perpetrators. Congress, after extensive hearings, expressly found that gender-motivated violence substantially affects interstate commerce, such as by impeding the employment, travel, and other economic activity of the victims and potential victims of such violence. The United States Court of Appeals for the Fourth Circuit, however, interpreted this Court's decision in *United States* v. *Lopez*, 514 U.S. 549 (1995), to compel a holding that the commerce power extends to the regulation of only those intrastate activities that are themselves economic in nature, and not to other activities that substantially affect interstate commerce, such as gender-motivated violence. Congress also expressly found that the States had failed, as a result of pervasive bias in their civil and criminal justice systems, to guarantee the equal protection of the laws to victims of gender-motivated

violence. The Fourth Circuit, however, construed this Court's decisions in *United States* v. *Harris*, 106 U.S. 629 (1883), and the *Civil Rights Cases*, 109 U.S. 3 (1883), to compel a holding that, because the Equal Protection Clause of the Fourteenth Amendment itself regulates only state action, Congress cannot regulate private conduct as a means of remedying violations of the Equal Protection Clause by the States and by state actors.

1. Congress enacted VAWA in 1994 to address "the escalating problem of violence against women." S. Rep. No. 138, 103d Cong., 1st Sess. 37 (1993) (1993 S. Rep.). Congress chose to address that problem through "several different complementary strategies," S. Rep. No. 197, 102d Cong., 1st Sess. 34 (1991) (1991 S. Rep.), including new federal crimes, a new federal civil remedy, and new federal grant programs. The crimes created by VAWA punish certain types of interstate domestic violence. See 18 U.S.C. 2261, 2262 (1994 & Supp. III 1997).[1] The grant programs authorized $1.6 billion in federal spending over six years to support state, local, and tribal efforts to reduce violence against women, including rape prevention and education programs, law-enforcement efforts, victim services programs, battered women's shelters, and improved security in public transit. See 42 U.S.C. 300w-10, 3796gg, 10409(a), 13931.

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[1] The criminal provisions of VAWA, which are not at issue here, have been uniformly sustained against constitutional challenge by the courts of appeals as a permissible regulation of interstate commerce. See *United States* v. *Gluzman*, 154 F.3d 49 (2d Cir. 1998), cert. denied, 119 S. Ct. 1257 (1999); *United States* v. *Wright*, 128 F.3d 1274 (8th Cir. 1997), cert. denied, 523 U.S. 1053 (1998); *United States* v. *Bailey*, 112 F.3d 758 (4th Cir.), cert. denied, 522 U.S. 896 (1997); see also *United States* v. *Page*, 167 F.3d 325 (6th Cir. 1999) (affirming conviction under VAWA's criminal provisions by an equally divided en banc court, whose members disagreed as to whether the defendant's conduct satisfied the statutory elements, but agreed that VAWA's criminal provisions are a permissible exercise of the commerce power).

Congress considered one of VAWA's "[m]ost important[]" components to be its civil rights provision, Section 13981, which gives victims of gender-motivated violence a federal cause of action against its perpetrators. 1993 S. Rep. 38. Congress described Section 13981 as "mak[ing] a national commitment to condemn crimes motivated by gender in just the same way that we have made a national commitment to condemn crimes motivated by race or religion." S. Rep. No. 545, 101st Cong., 2d Sess. 41 (1990) (1990 S. Rep.).

Section 13981(b) declares that "[a]ll persons within the United States shall have the right to be free from crimes of violence motivated by gender." Section 13981(c), in turn, provides:

> A person * * * who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) of this section [to be free from gender-motivated violence] shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.

Section 13981(d) then defines a "crime of violence motivated by gender" that could give rise to such a cause of action. A "crime of violence" is defined as "an act or series of acts that would constitute a felony against the person" (or a felony against property if the conduct poses "a serious risk of physical injury" to a person) and would satisfy the definition of a "crime of violence" in 18 U.S.C. 16, "whether or not those acts have actually resulted in criminal charges, prosecution, or conviction." 42 U.S.C. 13981(d)(2).[2] Such a

[2] A "crime of violence" is defined in 18 U.S.C. 16 as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another" or "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

crime is "motivated by gender" if it was committed "due, at least in part, to an animus based on the victim's gender." 42 U.S.C. 13981(d)(1).

Section 13981(a) identifies two sources of Congress's constitutional authority to create a federal cause of action for victims of gender-motivated violence: the Commerce Clause, which is found in Article I, Section 8 of the Constitution, and Section 5 of the Fourteenth Amendment.

2. In the Conference Report adopted in connection with VAWA, Congress explained why its commerce power extends to the regulation of gender-motivated violence:

> [C]rimes of violence motivated by gender have a substantial adverse effect on interstate commerce, by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved, in interstate commerce; crimes of violence motivated by gender have a substantial adverse effect on interstate commerce by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products.

H.R. Conf. Rep. No. 711, 103d Cong., 2d Sess. 385 (1994) (Conf. Rep.); see also 1993 S. Rep. 54 ("Gender-based crimes and the fear of gender-based crimes restrict[] movement, reduce[] employment opportunities, increase[] health expenditures, and reduce[] consumer spending, all of which affect interstate commerce and the national economy.").

Congress reached that conclusion after four years of extensive investigation and consideration of the problem of gender-motivated violence. At a series of committee hearings conducted between 1990 and 1993, Congress heard testimony from a variety of experts: state attorneys general,

federal and state law-enforcement officials, physicians, mental health professionals, legal scholars, representatives of women's organizations, and victims of gender-motivated violence. The voluminous evidence amassed during those hearings demonstrated to Congress that gender-motivated violence is pervasive, has a substantial effect on interstate commerce, and often goes unremedied due to widespread bias in state justice systems.[3]

a. Congress's extensive fact-finding revealed that violence against women is a problem of the first magnitude and of national scope. For example, the evidence showed:

- "Violent attacks by men now top[] the list of dangers to an American woman's health. Every 15 seconds, a woman is battered and, every 6 minutes, a woman is raped in the United States." 1991 S. Rep. 36.

- "Every week, during 1991, more than 2,000 women were raped and more than 90 women were murdered—9 out of 10 by men." 1993 S. Rep. 38.

- "An estimated 4 million American women are battered each year by their husbands or partners. Approximately 95% of all domestic violence victims

[3] See *Domestic Violence—Terrorism in the Home: Hearing Before the Subcomm. on Children, Family, Drugs and Alcoholism of the Senate Comm. on Labor and Human Resources*, 101st Cong., 2d Sess. (1990); *Women and Violence: Hearings Before the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. (1990) (1990 S. Judiciary Hearings); *Violence Against Women—Victims of the System: Hearing on S. 15 Before the Senate Comm. on the Judiciary*, 102d Cong., 1st Sess. (1991) (1991 S. Judiciary Hearing); *Violence Against Women: Hearing Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. (1992); *Crimes of Violence Motivated by Gender: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 103d Cong., 1st Sess. (1993).

are women." H.R. Rep. No. 395, 103d Cong., 2d Sess. 26 (1993) (1993 House Rep.).

- "Three out of four American women will be victims of violent crimes sometime during their life." *Id.* at 25.

The evidence before Congress further demonstrates that violence against women has a substantial impact on interstate commerce. As the 1993 Senate Report explained, "[g]ender-based violence bars its most likely targets—women—from full [participation] in the national economy," because violence and the fear of violence prevent women from obtaining and retaining employment, traveling, and engaging in other economic activity. 1993 S. Rep. 54.

Of those women who are victims of rape, for example, "almost 50 percent * * * lose their jobs or are forced to quit in the aftermath of the crime." 1993 S. Rep. 54. Even those women who remain employed after a rape or other crime of violence may experience a prolonged period of decreased productivity. 1990 S. Rep. 33. And "as many as 50 percent of homeless women and children are fleeing domestic violence." *Id.* at 37. It has thus been estimated that "violent crime against women costs this country at least 3 billion * * * dollars a year." *Id.* at 33; see also 1993 S. Rep. 41 (noting estimates that costs of domestic violence alone, including costs of victims' medical treatment, may amount to $5 billion to $10 billion a year).

Moreover, Congress found that "[e]ven the fear of gender-based violence affects the economy because it deters women from taking jobs in certain areas or at certain hours that pose a significant risk of such violence." 1993 S. Rep. 54. For example, Congress found that "women often refuse higher-paying night jobs in the service/retail industries

because of the fear of attack." *Id.* at 54 n.70.[4] Unfortunately, as Congress recognized, "[t]hose fears are justified." *Ibid.* (citing statistics indicating that homicide is the leading cause of death of women on the job). In addition, Congress found that many women are reluctant, for similar reasons, to use public transportation, particularly after dark. 1991 S. Rep. 38.[5]

b. Congress found that the problem of gender-motivated violence was exacerbated by pervasive bias in the state justice systems, including bias among police officers, prosecutors, judges, juries, and court employees. The Conference Report concluded that "bias and discrimination in the [state] criminal justice system often deprive[] victims of crimes of violence motivated by gender of equal protection of the laws and the redress to which they are entitled." Conf. Rep. 385.

In reaching that conclusion, Congress relied, in part, on the reports compiled by numerous state task forces on gender bias. Congress found that "[s]tudy after study commissioned by the highest courts of the States—from Florida to New York, California to New Jersey, Nevada to Minnesota—has concluded that crimes disproportionately affecting women are often treated less seriously than comparable crimes against men." 1991 S. Rep. 43; see also *id.* at 43 n.40 and 1993 S. Rep. 45 n.29, 49 n.52 (citing 20 such studies conducted between 1984 and 1991). Congress noted that "[c]ollectively these reports provide overwhelming evi-

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[4] See also, *e.g.*, 1991 S. Judiciary Hearing 86 (testimony of Professor Burt Neuborne) (Women "tend to choose their jobs with one eye looking over their shoulder about their safety. They can't work late like men can work; they can't work overtime; they can't take jobs in localities that are considered to be dangerous.").

[5] See, *e.g.*, 1990 S. Judiciary Hearings, Pt. 2, at 80 (letter from International Union, United Automobile, Aerospace & Agricultural Implement Workers of America) ("The threat of violence has made many women understandably afraid to walk our streets or use public transportation.").

dence that gender bias permeates the court system and that women are most often its victims." 1991 S. Rep. 43-44 (quoting Lynn H. Shafran, *Overwhelming Evidence: Reports on Gender Bias In the Courts*, Trial, Feb. 1990, at 28).

For example, the Illinois task force found that there was "a continuing suspicion of the credibility of sexual assault victims on the part of police, prosecutors, judges, and juries." Illinois Task Force on Gender Bias in the Courts, *Gender Bias in the Courts* 16 (1990). Accordingly, "[a]lthough rape is rarely committed before eyewitnesses and is often not reported immediately, prosecutors and investigators seek corroboration, including evidence of a 'prompt complaint.'" *Ibid.* (noting that sexual assault victims, unlike victims of other crimes, had been required by police and prosecutors to take polygraph tests). The Texas task force similarly found that "[w]omen sexual-assault victims are accorded less credibility by the judicial system than victims of other types of assaults." Texas Gender Bias Task Force, *Final Report* 5 (1994). Women frequently confront the assumption that they invited or precipitated a sexual assault. See, *e.g.*, 1991 S. Rep. 34 (describing how a Vermont probation officer questioned whether a 9-year-old girl was a "true victim" of sexual assault, since he had heard that she was a "tramp") (quoting Vermont Supreme Court & Vermont Bar Ass'n, *Report of the Vermont Task Force on Gender Bias in the Legal System* 140 (1991)). Such assumptions are particularly prevalent in cases of acquaintance rape, which prosecutors regularly refuse to prosecute. *Id.* at 47-48.

As a result of the task force reports on the treatment of sexual assault, together with testimony presented at congressional hearings, Congress found:

> From the initial report to the police through prosecution, trial, and sentencing, crimes against women are often treated differently and less seriously than other crimes. Police may refuse to take reports; prosecutors

> may encourage defendants to plead to minor offenses; judges may rule against victims on evidentiary matters; and juries too often focus on the behavior of the survivors—laying blame on the victims instead of on the attackers.

1993 S. Rep. 42. As a result, "a rape survivor may have as little as a 5-percent chance of having her rapist convicted." 1991 S. Rep. 44; see also *Crimes of Violence Motivated by Gender: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 103d Cong., 1st Sess. 94 (1993) (1993 House Judiciary Hearings) (statement of Rep. Schroeder that "[l]ess than 40 percent of reported rapes result in arrest * * * [and] [t]he conviction rate for rape is only 3 percent").

The state task force reports also demonstrated to Congress that "[g]ender bias contributes to the judicial system's failure to afford the protection of the law to victims of domestic violence." 1993 S. Rep. 46. In California, the state task force found that "police officers, district and city attorneys, court personnel, mediators, and judges—the justice system—treated the victims of domestic violence as though their complaints were trivial, exaggerated or somehow their own fault." *Ibid.* (quoting Administrative Office of Judicial Council of California Courts, *Achieving Equal Justice for Women and Men in the Courts* 5 (1993)); see also 1991 S. Rep. 34 (quoting a California judge as stating that a domestic violence victim in his court "probably should have been hit"). In Georgia, a state judge was reported to have "mocked," "humiliated," and "ridiculed" a domestic violence victim who, in fact, was later killed by her estranged husband. 1991 S. Rep. 34 (quoting Supreme Court of Georgia, *Report on Gender and Justice in the Judicial System* 235 (1991)). And, in Maryland, a state judge refused to believe a woman's complaint that her husband had threatened to kill her with his gun "because I don't believe that anything like this could

happen to me." *Ibid.* (quoting Maryland Special Joint Committee, *Gender Bias in the Courts* 2-3 (1989)). Congress found that such attitudes cause police, prosecutors, and judges to treat domestic violence more leniently than other sorts of violence. See 1993 S. Rep. 41 ("In cases where a comparable assault by a stranger on the street would lead to a lengthy jail [term], a similar assault by a spouse will result neither in arrest nor in prosecution.").

Congress also found that state civil remedies for victims of sexual assault and domestic violence are often significantly flawed. Congress noted, for example, that "in many States rape survivors * * * may be forced to expose their private lives and intimate conduct to win a damage award; and * * * in some cases, they may be barred from suit altogether by tort immunity doctrines or marital exemptions." 1993 S. Rep. 55. Accordingly, while sexual assault victims may, "[i]n theory," have certain civil remedies at their disposal, "[i]n practice, few are able to use those remedies." 1991 S. Rep. 44. Indeed, Congress noted that "[l]ess than 1 percent of all victims have collected damages" against their assailants—a statistic that Congress believed "belie[s] claims that State laws provide 'adequate' remedies for the victims of these crimes." *Ibid.*

Congress therefore concluded, based on its evaluation of the massive legislative record, that gender-motivated violence poses a national problem demanding a national response. The state attorneys general concurred: "Our experience as Attorneys General strengthens our belief that the problem of violence against women is a national one, requiring federal attention, federal leadership, and federal funds." 1993 House Judiciary Hearings 34-36 (letter from 38 state attorneys general).

Congress viewed the private right of action provided by Section 13981, together with the other provisions of VAWA, as an appropriate response to that national problem. Congress explained that Section 13981's declaration that "[a]ll

persons within the United States shall have the right to be free from crimes of violence motivated by gender" would make clear to all Americans—including participants in the justice system—that "attacks motivated by gender [bias] [are] to be considered as serious as crimes motivated by religious, racial, or political bias." 1993 S. Rep. 38. Congress further explained that the private right of action in Section 13981 was particularly important because it would "allow survivors an opportunity for legal vindication that the survivor, not the State, controls." 1990 S. Rep. 42.

3. In September 1994, at the time of the events at issue in this case, plaintiff Christy Brzonkala was an incoming freshman at Virginia Polytechnic Institute (Virginia Tech). Defendants Antonio Morrison and James Crawford were students at Virginia Tech and members of its football team. App. 8a.

Brzonkala alleges that 30 minutes after she met Morrison and Crawford, they pinned her down on a bed in her dormitory and took turns forcibly raping her. Afterwards, Morrison allegedly told Brzonkala, "You better not have any f***ing diseases." Subsequently, Morrison allegedly announced publicly in the dormitory's dining hall that "I like to get girls drunk and f*** the s*** out of them." App. 8a, 212a.

According to Brzonkala, she became depressed and withdrawn after the assault. She ceased attending classes, attempted suicide, and required psychiatric treatment. She ultimately withdrew from school. App. 212a-213a.

4. In December 1995, Brzonkala brought this action against Morrison and Crawford, invoking Section 13981, VAWA's civil rights provision. Morrison and Crawford moved to dismiss, arguing that Congress lacked constitutional authority to enact Section 13981 and that Brzonkala failed to state a claim under Section 13981. The United

States intervened to defend the constitutionality of the statute. App. 8a-9a, 217a.[6]

In July 1996, the district court granted the motion to dismiss. The court initially recognized that, because Brzonkala had stated a claim under Section 13981 at least against Morrison, the constitutional question would have to be decided. App. 361a-362a. The court then concluded that Congress lacked the constitutional authority to enact Section 13981.

The court held that Section 13981 was not a proper exercise of Congress's power under the Commerce Clause. App. 369a-382a. The court acknowledged the existence of "congressional findings which support that violence against women affects interstate commerce." *Id.* at 371a. However, notwithstanding the absence of such congressional findings in *United States* v. *Lopez*, 514 U.S. 549 (1995), the court concluded that Section 13981 was not meaningfully distinguishable from the statute struck down in *Lopez*.

The court also held that Section 13981 was not a proper exercise of Congress's power to enforce the Fourteenth Amendment. The court recognized that "[s]ome possibility exists that at least part of the states' differential treatment of gender-based violent crimes against women is due to gender discrimination, and so correcting the differential treatment arising out of gender discrimination is a legitimate Fourteenth Amendment concern." App. 399a. But the court concluded that "no reasonable possibility exists that VAWA will help remedy this legitimate Fourteenth Amendment

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[6] Brzonkala also filed suit under Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, against Virginia Tech, alleging that the school had subjected her to sex discrimination in its response to the assault. The district court held that Brzonkala had failed to state a claim under Title IX. A panel of the Fourth Circuit reversed. The en banc court of appeals deferred resolution of the Title IX issue pending this Court's decision in *Davis* v. *Monroe County Board of Education*, No. 97-843 (May 24, 1999). See App. 8a n.2.

concern," because "VAWA is tailored to remedy conduct other than the conduct giving rise to the equal protection concern," *i.e.*, the conduct of individual perpetrators of gender-motivated violence. *Id.* at 400a.

5. A divided panel of the Fourth Circuit reversed. App. 282a-349a. The court held that Section 13981 was a valid exercise of Congress's power under the Commerce Clause, *id.* at 340a, and consequently did not reach the Fourteenth Amendment question. Judge Luttig dissented, urging that the case was controlled by *Lopez*. *Id.* at 349a.

6. On rehearing en banc, a divided court of appeals affirmed the judgment of the district court, holding that Congress did not have the power to enact Section 13981 under either the Commerce Clause or Section 5 of the Fourteenth Amendment. App. 1a- 281a.

a. On the Commerce Clause question, the en banc court acknowledged that "[t]he legislative record in this case, considered as a whole, shows that violence against women is a sobering problem and also that such violence ultimately does take a toll on the national economy." App. 68a. The court likewise recognized that "Congress' specific findings regarding the relationship between gender-motivated violence and interstate commerce * * * depict the manner in which such violence affects interstate commerce." *Id.* at 68a-69a.

The court nonetheless concluded that Section 13981 could not be sustained under Congress's power to regulate activities substantially affecting interstate commerce. The court understood *Lopez* to hold that Congress cannot regulate an activity as substantially affecting interstate commerce unless (1) the regulated activity is itself an economic one or (2) the statute includes a jurisdictional element requiring a case-by-case inquiry into the nexus to interstate commerce. App. 15a-31a. Because Section 13981 "neither regulates an economic activity nor includes a jurisdictional element," the court concluded that "it cannot be upheld on the authority of

Lopez or any other Supreme Court holding demarcating the outer limits of Congress' power under the substantially affects test." *Id.* at 31a.

Alternatively, the court of appeals held that Section 13981 could not be sustained under the commerce power "[e]ven if these two categories of permissible congressional regulations demarcate not the absolute, but only the presumptive outer limits of congressional power under the substantially affects test." App. 31a-32a. Noting *Lopez*'s admonition that the commerce power cannot be construed in a manner that would "effectually obliterate the distinction between what is national and what is local and create a completely centralized government," *id.* at 33a (quoting *Lopez*, 514 U.S. at 557), the court concluded that Section 13981 presents the same federalism concerns as did the statute at issue in *Lopez*. App. 31a-51a. In the court's view, Section 13981 could not be upheld without endorsing an unlimited view of the commerce power that would permit Congress to "assume control over the entire field of violent crime, or, for that matter, all crime within all of the States." *Id.* at 89a.

b. The court of appeals also held that Section 13981 could not be sustained as legislation enforcing the Fourteenth Amendment, *i.e.*, legislation remedying bias in state civil and criminal justice systems against victims of gender-motivated violence. The court reasoned that Section 13981 "is invalid, regardless of whether its end is to remedy unconstitutional state action, for the simple reason that it regulates purely private conduct and is not limited to individual cases in which the state has violated the plaintiff's Fourteenth Amendment rights." App. 126a. The court stated that its conclusion was compelled by *United States* v. *Harris*, 106 U.S. 629 (1883), and the *Civil Rights Cases*, 109 U.S. 3 (1883). App. 104a-126a.

The court of appeals also held that Section 13981 did not satisfy the requirement articulated in *City of Boerne* v. *Flores*, 521 U.S. 507, 520 (1997), of "congruence and pro-

portionality between the [constitutional] injury to be prevented or remedied and the means adopted to that end." First, the court expressed doubt that the legislative record revealed constitutional violations to be remedied. App. 153a-160a. Although acknowledging that the record "does establish that the States enforce and apply certain laws in a manner that may ultimately prevent the victims of gender-motivated violence from obtaining vindication through the criminal or civil systems," the court questioned whether such conduct amounted to "*purposeful* discrimination against women in the enforcement of facially neutral laws that could give rise to an equal protection violation." *Id.* at 153a. Second, the court concluded that Section 13981 was not sufficiently narrowly tailored to remedy the asserted constitutional wrongs. *Id.* at 160a-163a. For example, said the court, Section 13981 applies in "all States and jurisdictions without regard to the adequacy of their enforcement efforts, substantive laws, or evidentiary rules and procedures, and does so without any time limit or termination mechanism." *Id.* at 162a.[7]

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[7] Chief Judge Wilkinson, in a concurring opinion, addressed whether the court of appeals' decision striking down Section 13981 constituted unjustifiable judicial activism. App. 168a-189a. He reasoned that federalism-based activism is more legitimate than the judicial activism of earlier eras, because its outcome does "not consistently favor[] a particular constituency," *id.* at 177a, and "removes no substantive decision from the stage of political debate" but merely directs where the decision is to be made, *id.* at 182a.

Judge Niemeyer, in a second concurring opinion, proposed a test for determining when Congress may regulate intrastate activity as substantially affecting interstate commerce. App. 189a-210a. Under that test, "(1) the target of [the regulation] must be interstate commerce, even though it may not be the purpose of the regulation, and (2) the effect that the activity has on interstate commerce must be proximate and not incidental." *Id.* at 198a. He concluded that Section 13981 did not satisfy that test. *Id.* at 200a-209a.

c. Judge Motz, writing for the four dissenting judges, concluded that Section 13981 was a valid exercise of Congress's power under the Commerce Clause. App. 210a-281a. The dissent concluded that Congress had the requisite rational basis, as reflected in the "detailed and extensive" legislative findings and testimony, *id.* at 229a, to determine that "gender-based violence substantially affects interstate commerce," *id.* at 237a. The dissent found no support in *Lopez* for limiting Congress's commerce power to statutes that regulate economic activities or contain a jurisdictional element. *Id.* at 240a-247a.

The dissent also rejected the majority's conclusion that federalism concerns undermined Section 13981, noting that Congress had "explicitly found that the states refused or were unable to deal effectively with the problems created by gender-based violence." App. 232a. Thus, the dissent explained, Section 13981 "provides a necessary national remedy for a severe problem that the states have, by their own admission, been unable to address effectively." *Id.* at 278a. The dissent concluded that Section 13981, in contrast to the statute in *Lopez*, did not "add[] a redundant layer of federal regulation in an area where most states had already acted," but instead "responded to the states' self-described needs." *Id.* at 276a.

REASONS FOR GRANTING THE PETITION

The court of appeals struck down 42 U.S.C. 13981, the civil rights provision of the Violence Against Women Act of 1994, as exceeding Congress's constitutional power to regulate interstate commerce or to enforce the Fourteenth Amendment. That decision misconstrues this Court's precedents and places unwarranted limits on Congress's authority to address a national problem of the first magnitude. Certiorari is warranted to review the court of appeals' "exercise of the grave power of annulling an Act of Congress," *United States* v. *Gainey*, 380 U.S. 63, 65 (1965), and to consider a

question of exceptional importance concerning the scope of Congress's constitutional powers, see *United States* v. *Lopez*, 514 U.S. 549, 552 (1995).

Although no other court of appeals has had occasion to address the constitutionality of Section 13981, and therefore no conflict yet exists in the circuits, the en banc Fourth Circuit itself was sharply divided, with seven judges concluding that Congress lacked constitutional authority to enact Section 13981 and four judges concluding otherwise. Moreover, the majority's decision conflicts with 14 district court rulings that have rejected constitutional challenges to Section 13981.[8] Three of those district courts, as well as one state court, did so after the Fourth Circuit's en banc decision in this case.[9]

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[8] See *Wright* v. *Wright*, No. Civ. 98-572-A (W.D. Okla. Apr. 27, 1999); *Ericson* v. *Syracuse Univ.*, No. 98 Civ. 3435 JSR, 1999 WL 212684 (S.D.N.Y. Apr. 13, 1999); *Culberson* v. *Doan*, No. C-1-97-965 (S.D. Ohio Apr. 8, 1999); *Doe* v. *Mercer*, 37 F. Supp. 2d 64 (D. Mass. 1999); *Liu* v. *Striuli*, 36 F. Supp. 2d 452 (D.R.I. 1999); *Ziegler* v. *Ziegler*, 28 F. Supp. 2d 601 (E.D. Wash. 1998); *C.R.K.* v. *Martin*, No. 96-1431 (D. Kan. July 10, 1998); *Timm* v. *DeLong*, No. 8:98-CV-43 (D. Neb. June 22, 1998); *Mattison* v. *Click Corp.*, No. 97-CV-2736, 1998 WL 32597 (E.D. Pa. Jan. 27, 1998); *Crisonino* v. *New York City Housing Auth.*, 985 F. Supp. 385 (S.D.N.Y. 1997); *Anisimov* v. *Lake*, 982 F. Supp. 531 (N.D. Ill. 1997); *Seaton* v. *Seaton*, 971 F. Supp. 1188 (E.D. Tenn. 1997); *Doe* v. *Hartz*, 970 F. Supp. 1375 (N.D. Iowa 1997), rev'd on other grounds, 134 F.3d 1339 (8th Cir. 1998); *Doe* v. *Doe*, 929 F. Supp. 608 (D. Conn. 1996). All of the courts relied on Congress's power under the Commerce Clause. The *Wright* and *Timm* decisions also held that Section 13981 was a permissible exercise of Congress's power to enforce the Fourteenth Amendment; the other courts did not reach that question. We are not aware of any challenges to Section 13981 pending in the courts of appeals.

[9] See *Wright*, *supra*; *Ericson*, *supra*; *Culberson*, *supra*; see also *Young* v. *Johnson*, No. CV-97-90014 (Ariz. Super. Ct. May 13, 1999). But see *Bergeron* v. *Bergeron*, No. Civ.A. 96-3445-A, 1999 WL 355954 (M.D. La. May 28, 1999) (holding that Congress lacked constitutional authority to enact Section 13981).

The court of appeals' decision also warrants review because it adopts an unduly restrictive view of the reach of Congress's powers under both the Commerce Clause and the Fourteenth Amendment, reading into *Lopez* and *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), limits on those powers that are more stringent than any expressly imposed by this Court. The Court should therefore grant review both to consider the constitutionality of Section 13981 and to clarify the extent of congressional power under the Commerce Clause and Section 5 of the Fourteenth Amendment.

A. The court of appeals held that Congress lacked authority under the Commerce Clause to address a problem with a substantial impact on the national economy that was extensively documented in four years of congressional hearings. The court concluded that Congress, in the exercise of its Commerce Clause powers, may adopt only statutes that directly regulate economic activity or that contain an express jurisdictional element. App. 15a-31a. The court further concluded that Section 13981 improperly intruded into a regulatory sphere reserved to the States. *Id.* at 31a-51a.

The court of appeals' decision reflects a misunderstanding of *Lopez*. The Court in *Lopez* did, of course, decline to undertake a series of inferential leaps to supply a connection between non-economic activity and interstate commerce that had not been identified by Congress itself. The Court never suggested, however, that Congress's commerce power does not extend to the regulation of non-economic activity when a significant impact on interstate commerce is made plain by the sort of congressional findings and extensive legislative record assembled in support of VAWA.

Moreover, while *Lopez* counsels that the judiciary should inquire into whether an exercise of the commerce power to regulate non-economic activity intrudes on state spheres of authority, that inquiry confirms the validity of Section 13981. Congress enacted VAWA, including its civil rights provision,

in response to the States' systemic failure, recognized by the States themselves, to address adequately the problem of gender-motivated violence. Congress violated no principle of federalism in seeking to vindicate the rights of victims of gender-motivated violence in the face of such systemic discrimination. When the States fail to resolve a problem that has a substantial impact on the national economy, the Constitution does not leave Congress powerless to act.

1. In *Lopez*, this Court invalidated the Gun-Free School Zones Act of 1990, Pub. L. No. 101-647, Title XVII, § 1702, 104 Stat. 4844, which made it a crime to possess any firearm near a school. The Court observed that the statute neither regulated an economic activity nor contained a jurisdictional element. *Lopez*, 514 U.S. at 551, 561-562. The Court did not treat those features as dispositive, however. To the contrary, the Court reaffirmed that "[e]ven if [an] activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce." *Id.* at 556 (quoting *Wickard* v. *Filburn*, 317 U.S. 111, 125 (1942)). Accordingly, the *Lopez* Court proceeded to evaluate what effect, if any, the regulated activity in that case had on interstate commerce.

The Court observed that "[n]either the statute nor its legislative history contain[ed] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone." 514 U.S. at 562 (citation omitted). Although "Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce," the Court explained, such findings "would enable us to evaluate the legislative judgment that the activity in question substantially affected

interstate commerce, even though no such substantial effect was visible to the naked eye." *Id.* at 562, 563.[10]

Without the benefit of a legislative record, the Court noted that it could not sustain the Gun-Free School Zones Act as a valid regulation of interstate commerce without "pil[ing] inference upon inference." 514 U.S. at 567. It would have had to conclude that possession of a gun in a school zone (1) might lead to violent crime, (2) which might threaten the learning process, (3) which might ultimately produce less productive citizens, (4) which might, cumulatively, impair the national economy. See *id.* at 563-564 (describing the government's argument); *id.* at 565 (describing the dissent's argument). The Court declined to find the requisite "substantial effect" on commerce based on such an unsubstantiated chain of inferences.

The Court observed that it had been offered no rationale to uphold the Gun-Free School Zones Act that was not capable of infinite expansion. 514 U.S. at 564 (finding it "difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign"). The Court therefore concluded that federalism principles prevented it from reaching a result that would "obliterate the distinction between what is national and what is local." *Id.* at 567 (quoting *United States* v. *A.L.A. Schechter Poultry Corp.*, 295 U.S. 495, 554 (1935) (Cardozo, J., concurring)).

Justice Kennedy's concurrence, which Justice O'Connor joined, likewise emphasized federalism concerns. However,

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[10] After the Fifth Circuit invalidated the Gun-Free School Zones Act for want of findings, Congress amended the statute to add findings about the effect on commerce of gun possession near schools. See 514 U.S. at 563 n.4. Those findings were not based upon a legislative record, however; the government did not rely upon them in defending the statute, and this Court did not address or even describe them. *Ibid.*; see *id.* at 612 n.2 (Souter, J., dissenting) (dismissing "these particular afterthoughts" as "conclusory").

like the opinion of the Court, the concurrence did not propose to enforce federalism-based limits by restricting Congress's commerce power to the regulation of economic activity. Instead, the concurrence explicitly presumed that Congress may, in some circumstances, regulate non-commercial activity. The concurrence urged that if "neither the [regulated] actors nor their conduct has a commercial character, and neither the purposes nor the design of the statute has an evident commercial nexus," then a court should "inquire whether the exercise of national power seeks to intrude upon an area of traditional state concern." 514 U.S. at 580. In other words, a court should ask whether principles of federalism call such a statute into question.

2. a. While the connection between gun possession near schools and interstate commerce was viewed by the *Lopez* court as attenuated, the connection between gender-motivated violence and interstate commerce is direct and expressly established in VAWA's extensive legislative record. See pp. 7-8, *supra*.

Congress found, among other things, that violence against women "deter[s] potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved, in interstate commerce." Conf. Rep. 385; see also 1993 S. Rep. 54 (finding that actual and feared gender-based violence "restricts movement, reduces employment opportunities, increases health expenditures, and reduces consumer spending"). The legislative record establishes that violence against women affects interstate commerce in ways that are direct and immediate. For example, "almost 50 percent of rape victims lose their jobs or are forced to quit because of the crime's severity." 1991 S. Rep. 53. The cost of employee absenteeism resulting from domestic violence is estimated at between $3 billion and $5 billion annually, 1990 S. Judiciary Hearings, Pt. 1, at 58, and the total cost of domestic violence, including "health care, criminal justice, and other social

costs," is estimated at between $5 billion and $10 billion annually, 1993 S. Rep. 41. See also 1990 S. Rep. 37 (noting toll of domestic violence in employee absenteeism, medical costs, and homelessness).

As the Court explained in *Lopez*, such findings are particularly significant where, as here, the connection between an activity and interstate commerce may not be "visible to the naked eye." 514 U.S. at 563. Indeed, the problem of gender-motivated violence itself has long been overlooked. See 1991 S. Rep. 38 ("We have underestimated the problem not only because of faulty statistical measures, but also because the sheer volume of these crimes dulls our sensitivity to the victims."). Women have often been shamed into silence about rape, domestic abuse, and other violent crimes—and the impact of such crimes upon their lives—because of the attitudes of society generally and even of the police, prosecutors, and court personnel assigned to deal with such crimes. See, *e.g.*, 1990 S. Rep. 33-34. The extensive findings reveal both the extent of the underlying problem and its substantial effect on interstate commerce.

Unlike in *Lopez*, then, the Court has no need to "pile inference on inference" to sustain Section 13981. To the contrary, in order to invalidate the statute, the Court would have to set aside Congress's findings of a direct nexus between gender-motivated violence and interstate commerce.

b. Nor does an inquiry into "whether the exercise of national power [to regulate local non-economic activity] seeks to intrude upon an area of traditional state concern," *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring), require the invalidation of Section 13981. Again, the difference between this case and *Lopez* is stark.

In the *Lopez* Court's view, the Gun-Free School Zones Act "inappropriately overr[ode] legitimate State firearms laws with a new and unnecessary Federal law." 514 U.S. at 561 n.3 (quoting Statement of President George Bush on Signing the Crime Control Act of 1990, 26 Weekly Comp. Pres. Doc.

1944, 1945 (Nov. 29, 1990)). The Court found no indication that the Act addressed a problem that could not adequately be addressed by the States. See *id.* at 581 (Kennedy, J., concurring) (noting that "over 40 States already have criminal laws outlawing the possession of firearms on or near school grounds").

In sharp contrast, Congress enacted Section 13981 to redress a problem that was caused, in part, by pervasive failures in the States' justice systems. See pp. 8-11, *supra*. If a regulated activity poses a substantial threat to interstate commerce, and the States cannot or will not adequately address that threat, federalism principles should not require the problem to go unresolved. Cf. *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 281-282 (1981) (in upholding Congress's authority under the Commerce Clause to impose national environmental standards for intrastate coal mining, the Court noted the congressional finding that States might fail to impose similarly rigorous standards out of concern for protecting local economic interests).

A statute premised on systemic state failure of this kind does not presage an open-ended expansion of federal power into domains properly reserved to the States. As the dissent below explained, "nothing more clearly illustrates the basic difference" between the statutes in this case and *Lopez* than that Section 13981 "responded to the states' self-described needs, while the [Gun-Free School Zones Act] added a redundant layer of federal regulation in an area where most states had already acted." App. 276a.

Moreover, Section 13981 is particularly respectful of federalism concerns and does not intrude into the operation of state government. Section 13981 displaces no state law. To the contrary, the statute incorporates by reference existing definitions of prohibited activity, see 42 U.S.C. 13981(d)(2), and simply provides a new civil remedy for vic-

tims of gender-motivated crime.[11] The federalism concerns that animated the Court's decision in *Lopez* thus do not require the invalidation of Section 13981.

B. 1. Section 13981 is also a valid exercise of Congress's power to enforce the Fourteenth Amendment. As this Court recently reaffirmed, "[i]t is for Congress in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference." *Flores*, 521 U.S. at 536 (quoting *Katzenbach* v. *Morgan*, 384 U.S. 641, 651 (1966)). The Court also reaffirmed that Section 5 of the Fourteenth Amendment gives Congress broad discretion in choosing the means to enforce those guarantees. See *id.* at 517-518; see also *Morgan*, 384 U.S. at 650 (Section 5 gives Congress "the same broad powers expressed in the Necessary and Proper Clause").

This Court has made clear that the question whether legislation falls within the scope of Congress's authority under Section 5 of the Fourteenth Amendment is distinct from the question whether particular conduct violates Section 1. Thus, "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'" *Flores*, 521 U.S. at 518 (quoting *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 455 (1976)). However, "as broad as the congressional enforcement power is, it is not unlimited." *Ibid.* (quoting *Oregon* v. *Mitchell*, 400 U.S. 112, 128 (1970) (opinion of Black, J.)). As this Court has explained, the Section 5 power is "remedial," not "substantive." *Id.* at 519.

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[11] Section 13981 also expressly precludes efforts to assert pendent federal jurisdiction over state-law disputes concerning divorce, alimony, equitable distribution of property, and child custody. See 42 U.S.C. 13981(e)(4).

Congress may not enact legislation that "alters the meaning" of the Constitution, *ibid.*, because its Section 5 power is "corrective or preventive, not definitional," *id.* at 525.

The *Flores* Court thus held that Congress had exceeded its Section 5 power in enacting the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.*, which the Court viewed as an apparent attempt to redefine the substantive scope of the Fourteenth Amendment. See 521 U.S. at 532. RFRA was adopted in direct response to this Court's decision in *Employment Division* v. *Smith*, 494 U.S. 872 (1990), which held that the States did not need a compelling justification to apply neutral, generally applicable laws that substantially burdened religious practices. The express purpose of RFRA was to reimpose the compelling interest test. *Flores*, 521 U.S. at 515-516. Because Section 5 gives Congress the power only to "enforce"—not to "attempt a substantive change in" (*id.* at 532)—constitutional rights, the Court held that Congress had exceeded its Section 5 power in enacting RFRA (see *id.* at 529-536).

2. Section 13981, unlike RFRA, cannot be viewed as an attempt to effect "a substantive change in constitutional protections." *Flores*, 521 U.S. 532. To the contrary, Section 13981 provides a remedy for recognized constitutional violations by state officials and other state actors, including police, prosecutors and judges. Based in part on the States' own studies, Congress found that "bias and discrimination in the [state] criminal justice system often deprive[] victims of crimes of violence motivated by gender of equal protection of the laws and the redress to which they are entitled." Conf. Rep. 385; see pp. 8-11, *supra* (discussing supporting materials).

Nevertheless, relying on *United States* v. *Harris*, 106 U.S. 629 (1883), and the *Civil Rights Cases*, 109 U.S. 3 (1883), the court of appeals ruled that Section 13981 "is invalid, regardless of whether its end is to remedy unconstitutional state action, for the simple reason that it regulates purely private

conduct and is not limited to individual cases in which the state has violated the plaintiff's Fourteenth Amendment rights." App. 126a. The court misread this Court's Reconstruction-era decisions, which do not bar Congress from reaching the conduct of private persons, provided that Congress does so in order to remedy discrimination by the State or its agents.

In *Harris*, the Court struck down a statute that was premised on the explicit assumption that purely private conduct could violate the Fourteenth Amendment. The statute at issue, Section 2 of the Civil Rights Act of 1871, ch. 22, 17 Stat. 13, outlawed conspiracies among private persons to deprive any person of the equal protection of the law. The explicit predicate for the application of the statute was a finding that private persons had committed an equal protection violation.

The statute at issue in the *Civil Rights Cases* similarly purported to extend the affirmative requirements of the Fourteenth Amendment directly to private parties. The Civil Rights Act of 1875, ch. 114, 18 Stat. 335, established a right to be free of private discrimination in public accommodations. See 109 U.S. at 9. The Court explained that the critical flaw in the statute was that it did "not profess to be corrective of any constitutional wrong committed by the States"; instead, the statute "step[ped] into the domain of local jurisprudence, and [laid] down rules for the conduct of individuals in society towards each other, and impose[d] sanctions for the enforcement of those rules, without referring in any manner to any supposed action of the State or its authorities." *Id.* at 14.

Although Congress may not determine that private conduct itself violates the Fourteenth Amendment, nothing in this Court's precedents bars Congress from regulating private conduct in order to provide a remedy for unconstitutional state action. To the contrary, as Congress declared in enacting VAWA: "While the 14th amendment

itself only covers actions by the States, Congress's power to enforce the amendment includes the power to create a private remedy as the most effective means to fight public discrimination." 1993 S. Rep. 55 n.72 (citing *Morgan*, 384 U.S. 641; *District of Columbia* v. *Carter*, 409 U.S. 418, 423, 424 n.8 (1973) (that "[t]he Fourteenth Amendment itself 'erects no shield against merely private conduct' * * * is not to say * * * that Congress may not proscribe purely private conduct under § 5 of the Fourteenth Amendment")).

Unlike the statutes invalidated by the Reconstruction-era Court, Section 13981 is not premised on the assumption that private conduct can violate the Fourteenth Amendment. Instead, Section 13981 compensates for discrimination in the state justice systems. It affords victims of gender-motivated violence a measure of the vindication and compensation that are often denied them by biased state actors. Section 13981 is thus "corrective legislation; that is, such as may be necessary and proper for counteracting such laws as the States may adopt or enforce, and which, by the [Fourteenth] amendment, they are prohibiting from making or enforcing, or such acts or proceedings as the states may commit or take, and which by the amendment they are prohibited from committing or taking." *Civil Rights Cases*, 109 U.S. at 13-14 (quoted in part in *Flores*, 521 U.S. at 525).

3. The court of appeals alternatively ruled that Section 13981, like the statute at issue in *Flores*, "is so out of proportion to any possible unconstitutional state action at which it might conceivably be aimed as to exceed congressional power to 'enforce' the Fourteenth Amendment." App. 160a. Again, the court misconstrued a decision of this Court.

The government in *Flores* advanced one legitimate constitutional end for RFRA: to prevent the enforcement of state laws that, although neutral on their face, were enacted with the unconstitutional object of targeting religious practices. See *Flores*, 521 U.S. at 529. The Court concluded,

however, that there was insufficient evidence in RFRA's legislative record of generally applicable laws passed because of religious bigotry. See *id.* at 530 ("The history of [religious] persecution in this country detailed in the hearings mention[ed] no episodes occurring in the past 40 years."). The Court also stressed RFRA's "[s]weeping coverage [that] ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter." *Id.* at 532. The Court found that such "congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of theirs citizens," *id.* at 534, was "so out of proportion" to the proffered constitutional end that RFRA could not "be understood as responsive to, or designed to prevent, unconstitutional behavior," *id.* at 532.

Section 13981 suffers from neither of the defects identified by this Court in *Flores*. The legislative record leaves no doubt that Section 13981 was enacted for a purpose within the purview of the Fourteenth Amendment: to remedy conscious bias against victims of sexual assault, domestic abuse, and other violent crimes that has been found to exist currently in state civil and criminal justice systems throughout the nation. It affords such victims "an opportunity for legal vindication that [the victim], not the State, controls"—an opportunity that may be exercised in federal court "with judges insulated from local political pressures and the power to screen out jurors who harbor irrational prejudices against, for example, rape victims." 1990 S. Rep. 42. That remedy provided by Sections 13981 is, moreover, entirely unintrusive as to the States. Unlike RFRA, Section 13981 displaces no state law and prohibits no state action. Instead, Section 13981 simply provides a federal remedy to those whose injuries could otherwise go unvindicated in state court.

* * *

In sum, Congress correctly concluded that its power to enact Section 13981, VAWA's civil rights remedy, "is firmly based on the Commerce Clause and on section 5 of the 14th Amendment." 1993 S. Rep. 54. Because the court of appeals invalidated a federal statute and imposed new limits on the scope of congressional power, this Court's review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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Supreme Court, U.S.
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In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ANTONIO J. MORRISON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI (VOLUME 1)

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

Nos. 96-1814, 96-2316

CHRISTY BRZONKALA, PLAINTIFF-APPELLANT

v.

VIRGINIA POLYTECHNIC INSTITUTE AND STATE UNIVERSITY; ANTONIO J. MORRISON; JAMES LANDALE CRAWFORD, DEFENDANTS-APPELLEES
AND
CORNELL D. BROWN; WILLIAM E. LANDSIDLE, IN HIS CAPACITY AS COMPTROLLER OF THE COMMONWEALTH, DEFENDANTS
LAW PROFESSORS; VIRGINIANS ALIGNED AGAINST SEXUAL ASSAULT; THE ANTI-DEFAMATION LEAGUE; CENTER FOR WOMEN POLICY STUDIES; THE DC RAPE CRISIS CENTER; EQUAL RIGHTS ADVOCATES; THE GEORGETOWN UNIVERSITY LAW CENTER SEX DISCRIMINATION CLINIC; JEWISH WOMEN INTERNATIONAL; THE NATIONAL ALLIANCE OF SEXUAL ASSAULT COALITIONS; THE NATIONAL COALITION AGAINST DOMESTIC VIOLENCE; THE NATIONAL COALITION AGAINST SEXUAL ASSAULT THE NATIONAL NETWORK TO END DOMESTIC VIOLENCE; NATIONAL ORGANIZATION FOR WOMEN; NORTHWEST WOMEN'S LAW CENTER; THE PENNSYLVANIA COALITION AGAINST DOMESTIC VIOLENCE, INCORPORATED; VIRGINIA NATIONAL ORGANIZATION FOR WOMEN; VIRGINIA NOW LEGAL

DEFENSE AND EDUCATION FUND, INCORPORATED; WOMEN EMPLOYED; WOMEN'S LAW PROJECT; WOMEN'S LEGAL DEFENSE FUND; INDEPENDENT WOMEN'S FORUM; WOMEN'S FREEDOM NETWORK, AMICI CURIAE

UNITED STATES OF AMERICA, INTERVENOR-APPELLANT
AND
CHRISTY BRZONKALA, PLAINTIFF

v.

ANTONIO J. MORRISON; JAMES LANDALE CRAWFORD, DEFENDANTS-APPELLEES
AND
VIRGINIA POLYTECHNIC INSTITUTE AND STATE UNIVERSITY; CORNELL D. BROWN; WILLIAM E. LANDSIDLE, IN HIS CAPACITY AS COMPTROLLER OF THE COMMONWEALTH, DEFENDANTS

LAW PROFESSORS; VIRGINIANS ALIGNED AGAINST SEXUAL ASSAULT; THE ANTI-DEFAMATION LEAGUE; CENTER FOR WOMEN POLICY STUDIES; THE DC RAPE CRISIS CENTER; EQUAL RIGHTS ADVOCATES; THE GEORGETOWN UNIVERSITY LAW CENTER SEX DISCRIMINATION CLINIC; JEWISH WOMEN INTERNATIONAL; THE NATIONAL ALLIANCE OF SEXUAL ASSAULT COALITIONS; THE NATIONAL COALITION AGAINST DOMESTIC VIOLENCE; THE NATIONAL COALITION AGAINST SEXUAL ASSAULT; THE NATIONAL NETWORK TO END DOMESTIC VIOLENCE; NATIONAL ORGANIZATION FOR WOMEN; NORTHWEST WOMEN'S LAW CENTER; THE

PENNSYLVANIA COALITION AGAINST DOMESTIC VIOLENCE, INCORPORATED; VIRGINIA NATIONAL ORGANIZATION FOR WOMEN; VIRGINIA NOW LEGAL DEFENSE AND EDUCATION FUND, INCORPORATED; WOMEN EMPLOYED; WOMEN'S LAW PROJECT; WOMEN'S LEGAL DEFENSE FUND; INDEPENDENT WOMEN'S FORUM; WOMEN'S FREEDOM NETWORK, AMICI CURIAE

[Argued: March 3, 1998
Decided: March 5, 1999]

Before: WILKINSON, Chief Judge, and WIDENER, MURNAGHAN, ERVIN, WILKINS, NIEMEYER, HAMILTON, LUTTIG, WILLIAMS, MICHAEL, and MOTZ, Circuit Judges.

OPINION

LUTTIG, Circuit Judge:

We the People, distrustful of power, and believing that government limited and dispersed protects freedom best, provided that our federal government would be one of enumerated powers, and that all power unenumerated would be reserved to the several States and to ourselves. Thus, though the authority conferred upon the federal government be broad, it is an authority constrained by no less a power than that of the People themselves. "[T]hat these limits may not be mistaken, or forgotten, the constitution is written." *Marbury v. Madison*, 1 Cranch 137, 176, 2 L.Ed. 60 (1803). These simple truths of power bestowed and

power withheld under the Constitution have never been more relevant than in this day, when accretion, if not actual accession, of power to the federal government seems not only unavoidable, but even expedient.

These foundational principles of our constitutional government dictate resolution of the matter before us. For we address here a congressional statute, Subtitle C of the Violence Against Women Act, 42 U.S.C. § 13981, that federally punishes noncommercial intrastate violence, but is defended under Congress' power "[t]o regulate *commerce* . . . *among* the several States," U.S. Const. art. I, § 8, cl. 3, and that punishes private conduct, but is defended under Congress' power "to enforce, by appropriate legislation" the Fourteenth Amendment guarantee that "[n]o *State* shall . . . deny to any person within its jurisdiction the equal protection of the laws," U.S. Const. amend. XIV, §§ 1, 5. Such a statute, we are constrained to conclude, simply cannot be reconciled with the principles of limited federal government upon which this Nation is founded. As even the United States and appellant Brzonkala appear resignedly to recognize, the Supreme Court's recent decisions in *United States v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624, 131 L.Ed.2d 626 (1995), and *City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157, 138 L.Ed.2d 624 (1997), which forcefully reaffirmed these most basic of constitutional principles, all but preordained as much. Enacted by the Congress assertedly in exercise of its powers both to regulate interstate commerce and to enforce the prohibitions of the Fourteenth Amendment, section 13981 was initially defended by appellants in the wake of *United States v. Lopez* primarily as a valid exercise, not of Congress' Commerce Clause power, but of Congress' power under Section 5

to enforce the Fourteenth Amendment's restrictions on the States—notwithstanding the statute's regulation of conduct purely private. Confronted by the Supreme Court's intervening decision in *City of Boerne v. Flores* during this appeal, the appellants retreated to defend the statute primarily as an exercise, not of Congress' power under Section 5 of the Fourteenth Amendment, but of its power under the Commerce Clause—notwithstanding the statute's regulation of conduct neither commercial nor interstate. And, finally, in the end, appellants are forced by these two plainly controlling decisions to defend the statute on little more than wistful assertions that *United States v. Lopez* is an aberration of no significance and that the established precedents upon which *City of Boerne v. Flores* rested—*United States v. Harris*, 106 U.S. 629, 1 S. Ct. 601, 27 L.Ed. 290 (1883), and the *Civil Rights Cases*, 109 U.S. 3, 3 S. Ct. 18, 27 L.Ed. 835 (1883)—should be disregarded as insufficiently "modern" to define any longer the reach of Congress' power under the Fourteenth Amendment.

Appreciating the precariousness in which appellants find themselves by virtue of the intervening decisions in *Lopez* and *City of Boerne*, but accepting these recent and binding authorities as the considered judgments of a Supreme Court that has incrementally, but jealously, enforced the structural limits on congressional power that inhere in Our Federalism, *see Printz v. United States*, 521 U.S. 98, 117 S. Ct. 2365, 2376-78, 138 L.Ed.2d 914 (1997); *City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157, 2162, 2168, 2172, 138 L.Ed.2d 624 (1997); *Seminole Tribe v. Florida*, 517 U.S. 44, 64-65, 116 S. Ct. 1114, 134 L.Ed.2d 252 (1996); *United States v. Lopez*, 514 U.S. 549, 552-53, 556-57, 567-68, 115 S. Ct.

1624, 131 L.Ed.2d 626 (1995); *New York v. United States*, 505 U.S. 144, 155-57, 112 S. Ct. 2408, 120 L.Ed.2d 120 (1992), we hold today that section 13981 exceeds Congress' power under both the Commerce Clause of Article I, Section 8, and the Enforcement Clause of Section 5 of the Fourteenth Amendment.

To otherwise hold would require not only that we, as the dissent would do, disclaim all responsibility to "determine whether the Congress has exceeded limits allowable in reason for the judgment which it has exercised," *Polish Nat'l Alliance v. NLRB*, 322 U.S. 643, 650, 64 S. Ct. 1196, 88 L.Ed. 1509 (1944), and embrace the view of federalism articulated by Justice Blackmun over passionate denouncements by the Chief Justice and Justice O'Connor in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S. Ct. 1005, 83 L.Ed.2d 1016 (1985), but that we extend the reach of Section 5 of the Fourteenth Amendment beyond a point ever contemplated by the Supreme Court since that Amendment's ratification over a century and a quarter ago. These things we simply cannot do.

I.

In response to the problems of domestic violence, sexual assault, and other forms of violent crime against women, Congress enacted the Violence Against Women Act of 1994 ("VAWA"), Pub. L. No. 103-322, §§ 40001-40703, 108 Stat. 1796, 1902-55. This legislation represents a multifaceted federal response to the problem of violence against women and includes a host of provisions, only one of which we address today.

VAWA's provisions are too numerous to discuss exhaustively here. Among its many provisions not at

issue, VAWA provides extensive federal funding—initially $1.6 billion, but subject to subsequent enhancement—to the States to help them curtail violence against women through law enforcement efforts, 42 U.S.C. § 3796gg, education and prevention programs, *id.* § 300w-10, and the maintenance of battered women's shelters, *id.* § 10402(a); it criminalizes interstate acts of domestic violence, 18 U.S.C. § 2261, as well as the interstate violation of protective orders against violence and harassment, *id.* § 2262; it imposes various sentencing enhancements for existing federal crimes motivated by gender animus, 28 U.S.C. § 994, restitution to the victims of violent crime against women, 18 U.S.C. §§ 2248, 2259, 2264, and other remedial provisions governing those who commit violent crimes against women, *see, e.g.*, *id.* § 2247 (repeat offenders); *id.* § 2263 (pretrial release of defendants); it amends the Federal Rules of Evidence by adopting a rape shield provision to exclude from sexual assault trials evidence of a victim's prior sexual behavior, 28 U.S.C. § 2074; Fed. R. Evid. 412; and it mandates that all States give Full Faith and Credit to the protective orders of every other State, 18 U.S.C. § 2265.

In addition to these provisions, however, VAWA establishes, in the single section at issue before us today, a federal substantive right in "[a]ll persons within the United States . . . to be free from crimes of violence motivated by gender." 42 U.S.C. § 13981(b). *See infra* Part II. And, to enforce this substantive right, section 13981(c) creates a private cause of action against any "person . . . who commits a crime of violence motivated by gender," 42 U.S.C. § 13981(c), and allows any party injured by such a crime to obtain

compensatory damages, punitive damages, and injunctive, declaratory, or other appropriate relief, *id.*

Plaintiff-appellant Christy Brzonkala brought the instant action under section 13981 in federal district court against defendants-appellees Antonio Morrison and James Crawford. As is relevant here, she alleged as follows.[1] Brzonkala was a student at Virginia Polytechnic Institute at the time of the incident at issue. Morrison and Crawford were students at Virginia Polytechnic Institute at the same time and were members of the school's football team. Brzonkala alleges that soon after she met Morrison and Crawford, the two defendants pinned her down on a bed in her dormitory and forcibly raped her. J.A. at 71-72. Afterwards, Morrison told Brzonkala, "You better not have any f * * * ing diseases." *Id.* at 72. And, subsequently, Morrison announced publicly in the dormitory's dining hall, "I like to get girls drunk and f * * * the s * * * out of them." *Id.* at 73. In her complaint, Brzonkala alleges, *inter alia*, that these acts by Morrison and Crawford violated her right under 42 U.S.C. § 13981(b) to be free from gender-motivated crimes of violence.[2]

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[1] This statement of facts is drawn almost verbatim from the statement of facts set forth by the United States and adopted, for purposes of this appeal, by appellees Morrison and Crawford. Br. of Intervenor United States at 16-17; Br. of Appellees at 1 (adopting statement of facts set forth by the United States).

[2] Appellant Brzonkala also contends that the district court improperly dismissed her claims against Virginia Polytechnic Institute under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688, in which she assertedly alleged both disparate treatment and hostile environment causes of action. We do not question the district court's conclusion that Brzonkala failed to state a claim alleging disparate treatment, and we thus affirm that

Morrison and Crawford moved to dismiss Brzonkala's claim on the grounds that the complaint failed to state a claim under section 13981 and that, even if the complaint did state such a claim, Congress was without constitutional authority to enact section 13981. The United States intervened to defend the constitutionality of section 13981 under the Commerce Clause and Section 5 of the Fourteenth Amendment—the two sources of power expressly invoked by Congress in enacting section 13981. *See* 42 U.S.C. § 13981(a) (declaring statute adopted "[p]ursuant to the affirmative power of Congress to enact this part under section 5 of the Fourteenth Amendment to the Constitution, as well as under section 8 of Article I of the Constitution"). The government, joined by Brzonkala, defended section 13981 as an appropriate exercise of Congress' power to regulate interstate commerce on the ground that violence against women is a widespread social problem with ultimate effects on the national economy. They defended section 13981 as an exercise of Section 5 of the Fourteenth Amendment on the grounds that bias and discrimination against women in the state criminal justice systems often deny legal redress to the victims

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holding and the reasoning upon which it was based. With respect to the hostile environment claim, the Supreme Court of the United States has recently agreed to decide whether student on student sexual harassment is actionable at all under Title IX. *See Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390 (11th Cir. 1997), *cert. granted*, —— U.S. ——, 119 S. Ct. 29, 141 L.Ed.2d 789, 66 U.S.L.W. 3387 (1998). Because the Court's decision in *Davis* will almost certainly prove informative of whether Brzonkala has sufficiently pled such a cause of action, if not determinative of that asserted cause of action as a matter of law, we vacate the district court's dismissal of the hostile environment cause of action and remand with instructions to the district court to hold this claim in abeyance pending the Supreme Court's disposition of *Davis*.

of gender-motivated crimes of violence and that such denials may violate the Equal Protection Clause.

In a thorough opinion, the district court concluded that Brzonkala stated a statutory claim against defendant Morrison, but held that Congress was without authority under the Constitution to enact section 13981. 935 F. Supp. 779 (W.D. Va. 1996). With respect to whether section 13981 could be justified under Congress' power "[t]o regulate Commerce . . . among the several States," U.S. Const. art. I, § 8, cl. 3, the district court meticulously canvassed the reasoning of *Lopez*, the Supreme Court's recent decision that invalidated the Gun-Free School Zones Act of 1990 as an unconstitutional exercise of Congress' Commerce Clause power. 935 F. Supp. at 785-88. The district court concluded that section 13981, like the Gun-Free School Zones Act, regulated neither the channels of interstate commerce nor the instrumentalities of interstate commerce, and thus could be upheld, if at all, only as a regulation of an activity that "substantially affects" interstate commerce. *Id.* at 786. Applying *Lopez*'s "substantially affects" test to section 13981, the district court concluded that, like the Gun-Free School Zones Act, section 13981 could not be sustained under the Commerce Clause both because it regulated non-economic activity (private acts of gender-motivated violence) without any jurisdictional requirement limiting its application only to particular acts of violence that in fact affect interstate commerce and because the practical implications of concluding that gender-motivated violence was sufficiently related to interstate commerce to justify its regulation would be to grant Congress power to regulate virtually the whole of criminal and domestic relations law. *Id.* at 788-93. The

district court reasoned that these failings rendered section 13981 materially indistinguishable from the Gun-Free School Zones Act invalidated in *Lopez*, and that the asserted differences between section 13981 and the Gun-Free School Zones Act—that Congress made more extensive findings with respect to section 13981, that section 13981 imposes only civil and not criminal liability, and that there are arguably slightly "fewer steps of causation" in the chain from gender-motivated violence to an effect on interstate commerce—were, essentially, superficial distinctions in light of the Supreme Court's controlling reasoning in *Lopez*. *Id.*

Turning to Section 5, the district court then concluded that section 13981 was not "appropriate legislation" "to enforce" the guarantee that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, §§ 1, 5. In this regard, the district court concluded, first, that section 13981, which regulates private acts of gender-motivated violence, could not be reconciled with controlling Supreme Court precedent holding that Congress may not regulate purely private conduct under Section 5. 935 F. Supp. at 793-94 (citing, among others, *Civil Rights Cases*, 109 U.S. 3, 3 S. Ct. 18, 27 L.Ed. 835 (1883)). Second, the district court reasoned that, even if Congress could regulate some private conduct under Section 5 as a means of remedying violations of the Equal Protection Clause by the States, section 13981 was nonetheless invalid because it was not a closely tailored means to that end:

> [Section 13981] is tailored to remedy conduct other than the conduct giving rise to the equal protection concern. [Section 13981] compensates victims for the violence directed against them because of their

> gender, not for the states' denial of equal protection. . . . The statute is overbroad: many women who do not suffer Fourteenth Amendment violations at the hands of the state system would still have a [section 13981] claim. A woman in a state with fair rape laws who is raped and whose rapist receives the maximum sentence may still have a [section 13981] claim. That woman may receive compensation via [section 13981] despite having suffered no denial of her equal protection rights. [Section 13981] is also too narrow: many women who suffer clear violations of their Fourteenth Amendment rights would not have a [section 13981] remedy, because the crime was not based on the woman's gender. These women would not receive any compensation despite the fact that the states clearly denied them equal protection of the laws.

Id. at 800. Finally, the district court concluded that section 13981 was not even *aimed* at remedying violations of the Equal Protection Clause by the States, primarily because it regulates the perpetrators of gender-motivated violence rather than the States themselves or those acting under color of state law. Accordingly, the district court concluded that "[n]o reasonable possibility exists that, in enacting [section 13981], Congress has enforced the Fourteenth Amendment mandate that '[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws,'" *id.* at 801 (quoting U.S. Const. amend. XIV, § 1), and that "[n]o reasonable possibility exists that [section 13981] will remedy any legitimate Fourteenth Amendment concern." *Id.*

The government and Brzonkala appealed this decision, and, on December 23, 1997, a divided panel of this court reversed the judgment of the district court, holding that section 13981 was a legitimate exercise of Congress' power under the Commerce Clause. 132 F.3d 949 (4th Cir. 1997). By order dated February 2, 1998, the full court vacated the judgment and opinion of that panel, and, on March 3, 1998, we reheard the case *en banc*.

II.

As a threshold matter, we must determine whether Brzonkala has stated a claim under section 13981 sufficient to withstand appellees' motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. We hold that Brzonkala has properly stated a claim under section 13981 against appellee Morrison. We do not reach, because it is unnecessary to do so, the question of whether her complaint properly states a section 13981 claim against appellee Crawford.

Section 13981 provides a civil remedy to parties injured by "a crime of violence motivated by gender." 42 U.S.C. § 13981(c). The statute defines the term "crime of violence" by reference to existing state and federal law. *Id.* § 13981(d)(2) (defining the term to include "an act or series of acts that would constitute a felony" "and that would come within the meaning of State or Federal offenses"). Such a crime is defined to be "motivated by gender" for the purposes of the statute when that crime is "committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender." *Id.* § 13981(d)(1); *see also id.* § 13981(e)(1) (no cause of action "for random acts of violence unrelated to gender or for acts that cannot be demonstrated, by a preponderance of the evidence, to be motivated by gender").

Crawford and Morrison concede that Brzonkala's complaint alleges that they have committed "crime[s] of violence" within the meaning of the statute. *Cf.* J.A. at 96-97 (complaint alleging that Morrison and Crawford's conduct toward Brzonkala violated Virginia criminal law in several respects). They challenge, however, Brzonkala's allegation that they acted "because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender." 42 U.S.C. § 13981(d)(1).

Brzonkala has explicitly alleged that the defendants-appellees' actions "were motivated wholly by discriminatory animus toward her gender and were not random acts of violence." J.A. at 24. As it relates to Morrison, this allegation of gender motivation is supported and corroborated by Brzonkala's allegation that Morrison stated publicly that he "like[d] to get girls drunk and f * * * the s * * * out of them." *Id.* at 20. Although these allegations do not necessarily compel the conclusion that Morrison acted from animus toward women as a class, and might not even be sufficient, without more, to defeat a motion either for summary judgment or for a directed verdict, we hold that they are sufficient to defeat Morrison's motion to dismiss.[3]

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[3] It is much less clear whether Brzonkala has properly stated a section 13981 claim against appellee Crawford, as Crawford is not alleged to have made statements like Morrison's. By concluding that Brzonkala has stated a claim against Morrison, however, we are forced to confront the question of whether section 13981 exceeds the scope of Congress' constitutional powers. Our resolution of that question, which we discuss below at Parts III-IV, renders unnecessary any decision as to whether Brzonkala has also stated a claim against Crawford.

So concluding, we are faced directly, as appellants urge, with the question whether section 13981 represents a constitutional exercise of Congress' power under either the Commerce Clause of Article I, Section 8, or Section 5 of the Fourteenth Amendment.

III.

After the Supreme Court's decision in *United States v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624, 131 L.Ed.2d 626 (1995), but before the Court's decision two years ago in *City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157, 138 L.Ed.2d 624 (1997), the appellants defended section 13981 primarily as a valid exercise of Congress' enforcement authority under Section 5 of the Fourteenth Amendment. Since the decision in *City of Boerne*, the appellants have resorted to defending the section primarily as a valid exercise of Congress' power under the Commerce Clause. Therefore, we address ourselves first to this defense of the statute.

In *United States v. Lopez*, the Supreme Court held that Congress had exceeded its power to regulate interstate commerce in enacting the Gun-Free School Zones Act of 1990 ("GFSZA"), 18 U.S.C. § 922(q). In so holding, the Court reaffirmed that, although the Commerce Clause represents a broad grant of federal authority, that authority is not plenary, but subject to outer limits. *See, e.g., Lopez*, 514 U.S. at 556-57, 567-68, 115 S. Ct. 1624. And although the Court reaffirmed that congressional power under the Commerce Clause is not limited solely to the regulation of interstate commerce *per se*, but extends to laws governing activities sufficiently related to interstate commerce to render their regulation necessary and proper to the regulation of interstate commerce, the Court also substantially clari-

fied the scope and the limits of Congress' Article I, Section 8 power. Under the principles articulated by the Court in *Lopez*, it is evident that 42 U.S.C. § 13981, like the Gun-Free School Zones Act, does not regulate an activity sufficiently related to interstate commerce to fall even within the broad power of Congress under the Commerce Clause.

A.

In demarcating the limits of congressional power to regulate activities that do not themselves constitute interstate commerce, the Court in *Lopez* made clear that such power does not extend to the regulation of activities that merely have some relationship with or effect upon interstate commerce, but, rather, extends only, as is relevant here, to those activities "having a *substantial* relation to interstate commerce, . . . *i.e.*, those activities that *substantially* affect interstate commerce." *Lopez*, 514 U.S. at 558-59, 115 S. Ct. 1624 (emphases added); *accord id.* at 559, 115 S. Ct. 1624 ("[O]ur case law has not been clear whether an activity must 'affect' or 'substantially affect' interstate commerce in order to be within Congress' power to regulate it under the Commerce Clause. We conclude, consistent with the great weight of our case law, that the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce." (citations omitted)).[4]

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[4] As the Court reaffirmed in *Lopez*, Congress may, under the Commerce Clause, "regulate the use of the channels of interstate commerce" and "regulate and protect the instrumentalities of interstate commerce, or persons and things in interstate commerce, even though the threat may come only from intrastate activities," in addition to regulating activities that substantially affect interstate commerce. *Lopez*, 514 U.S. at 558-59, 115 S. Ct. 1624. It is

Furthermore, the Court made explicit that whether an activity "substantially affects" interstate commerce such that it may be regulated under the Commerce Clause "is ultimately a judicial rather than a legislative question." *Id.* at 557 n. 2, 115 S. Ct. 1624 (quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 273, 85 S. Ct. 348, 13 L.Ed.2d 258 (1964) (Black, J., concurring)). Thus, the Court not only reaffirmed that the limits of the Commerce Clause are judicially enforceable, *see also id.* at 557, 115 S. Ct. 1624 ("[T]he power to regulate commerce, though broad indeed, has limits that [t]he Court has ample power to enforce." (internal quotation and citation omitted)); *id.* at 566, 115 S. Ct. 1624 (referring to "judicially enforceable outer limits" of the Commerce Clause); *id.* at 580, 115 S. Ct. 1624 (Kennedy, J., concurring) (discussing Court's "duty to recognize meaningful limits on the commerce power of Congress"), it also made clear, as its analysis confirms, that the "substantially affects" test does not contemplate a mere factual or empirical inquiry, but must be understood, in the final analysis, as a *legal* test, and the phrase "substantially affects interstate commerce" as one of legal art.

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both clear and undisputed by the parties that § 13981, like the GFSZA,

> is not a regulation of the use of the channels of interstate commerce, nor is it an attempt to prohibit the interstate transportation of a commodity through the channels of commerce; nor can it be justified as a regulation by which Congress has sought to protect an instrumentality of interstate commerce or a thing in interstate commerce.

Id. at 559, 115 S. Ct. 1624. Thus, § 13981 can be sustained under the Commerce Clause only if it constitutes "a regulation of an activity that substantially affects interstate commerce." *Id.*

In clarifying the content of this legal test, the Court specifically identified two types of laws that it had upheld as regulations of activities that substantially affect interstate commerce: (1) "regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce," *Lopez*, 514 U.S. at 561, 115 S. Ct. 1624 (majority), and (2) regulations that include a jurisdictional element to ensure, "through case-by-case inquiry," that each specific application of the regulation involves activity that in fact affects interstate commerce, *id.*

The Court also emphasized that, any dictum in its previous cases notwithstanding, *see infra* Part III.E, it had never extended the substantially affects test to uphold the regulation of a noneconomic activity in the absence of a jurisdictional element, *see, e.g., id.* at 560, 115 S. Ct. 1624 ("Even *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not."); *id.* at 580, 115 S. Ct. 1624 (Kennedy, J., concurring) ("[U]nlike the earlier cases to come before the Court here neither the actors nor their conduct have a commercial character, and neither the purposes nor the design of the statute have an evident commercial nexus."). And it confirmed that it was unwilling to follow "[t]he broad language" in certain previous cases that had "suggested the possibility of additional expansion" of congressional authority under the Commerce Clause by extending that authority beyond the scope of its previous holdings, *Lopez*, 514 U.S. at 567, 115 S. Ct. 1624 (majority) ("declin[ing] here to proceed any further"). Most importantly, the Court expressly

held that because the Gun-Free School Zones Act "neither regulate[d] a commercial activity nor contain[ed] a requirement that the possession be connected in any way to interstate commerce," *id.*, "it exceed[ed] the authority of Congress '[t]o regulate Commerce . . . among the several States . . .,'" *id.* at 551, 115 S. Ct. 1624 (quoting U.S. Const. art. I, § 8, cl. 3) (ellipses in original). *Accord id.* at 567-68, 115 S. Ct. 1624; *cf. id.* at 561, 115 S. Ct. 1624 ("[GFSZA] is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms. . . . It cannot, *therefore*, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." (emphasis added)).

That the Court's focus on the failure of the Gun-Free School Zones Act either to regulate economic activity or to include a jurisdictional element was intended to demarcate the outer limits—or, at the very least, the presumptive outer limits, *see infra* Part III.C—of congressional power under the substantially affects test is explicitly confirmed throughout the majority and concurring opinions. *See, e.g., id.* at 566, 115 S. Ct. 1624 ("Admittedly, a determination whether an intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty. But, so long as Congress' authority is limited to those powers enumerated in the Constitution, and so long as those enumerated powers are interpreted as having judicially enforceable *outer limits*, congressional legislation under the Commerce Clause always will engender 'legal uncertainty.'") (emphasis added); *id.* at 573-74, 115 S. Ct.

1624 (Kennedy, J., concurring) (listing certain prior cases as "examples of the exercise of federal power where commercial transactions were the subject of regulation" and noting that "[t]hese and like authorities are within the fair ambit of the Court's practical conception of commercial regulation and are not called in question by our decision today"). And such an understanding of the case follows inescapably, as well, from the enormous emphasis placed by the Court—essentially ignored by both the appellants and the dissent—on the "commercial concerns that are central to the Commerce Clause," *id.* at 583, 115 S. Ct. 1624, and on the corresponding distinction between regulation of commercial or economic activities and regulation of noncommercial, noneconomic activities, *see, e.g., id.* at 627-28, 115 S. Ct. 1624 (Breyer, J., dissenting) (recognizing the majority's "critical distinction between 'commercial' and non-commercial 'transaction[s]'"); *id.* at 608, 115 S. Ct. 1624 (Souter, J., dissenting) (similar); *cf. Hoffman v. Hunt*, 126 F.3d 575, 586-87 (4th Cir. 1997) ("The [*Lopez*] Court repeatedly pointed to a distinction between the regulation of, on the one hand, those activities that are commercial or economic in nature—or arise out of or are connected with a commercial transaction—and, on the other hand, those activities that are not. In the two instances in which it stated the controlling analysis, the Court focused on the fact that possession of a gun in a school zone was neither itself an economic or commercial activity nor had any connection with such activity.").[5]

[5] Although appellants—in six briefs—confine their tepid acknowledgment of this distinction to a single sentence, *see infra* note 19 and accompanying text, it is impossible to ignore either the distinction drawn by the Court between regulations of economic and noneconomic activities or the critical importance of this distinction to the Court's analysis. *See, e.g., Lopez*, 514 U.S. at 559, 115 S. Ct. 1624 (majority) ("[W]e have upheld a wide variety of congressional Acts regulating intrastate *economic* activity where we have concluded that the activity substantially affected interstate commerce.") (emphasis added); *id.* at 560, 115 S. Ct. 1624 ("Where *economic* activity substantially affects interstate commerce, legislation regulating that activity will be sustained.") (emphasis added); *id.* at 561, 115 S. Ct. 1624 ("[GFSZA] is not an essential part of a larger regulation of *economic* activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.") (emphasis added); *id.* at 565-66, 115 S. Ct. 1624 ("We do not doubt that Congress has authority under the Commerce Clause to regulate numerous *commercial* activities that substantially affect interstate commerce and also affect the educational process.") (emphasis added); *id.* at 567, 115 S. Ct. 1624 ("The possession of a gun in a local school zone is in no sense an *economic* activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce.") (emphasis added); *id.* at 574, 115 S. Ct. 1624 (Kennedy, J., concurring) ("*Stare decisis* operates with great force in counseling us not to call in question the essential principles now in place respecting the congressional power to regulate transactions of a *commercial* nature. . . . Congress can regulate in the *commercial* sphere on the assumption that we have a single market and a unified purpose to build a stable national economy.") (emphases added); *id.* at 577, 115 S. Ct. 1624 ("Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of *commercial* activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory.") (emphasis added); *id.* at 583, 115 S. Ct. 1624 (GFSZA regulates "an activity beyond the realm of *commerce* in the ordinary and usual sense of that term.") (emphasis added); *id.* (GFSZA could not be sustained "[a]bsent a stronger connection or identification with *commercial concerns that are central to the Commerce Clause*") (emphasis added); *id.* at 595, 115 S. Ct. 1624 (Thomas, J., concurring) (distinguishing regulation of "intrastate *commerce* that substantially affects interstate and foreign commerce" from regulation of "all

Accordingly, the dissent's assertion that the rule that Congress' power under the Commerce Clause is at least *presumptively* limited to regulating economic activities and promulgating regulations that include a jurisdictional element is an "unprecedented new rule of law," *see infra* at 917, is perplexing. For this is precisely the rule repeatedly articulated by the Supreme Court in

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activities that affect interstate commerce"); *id.* at 601 n.9, 115 S. Ct. 1624 ("[C]ommercial character is not only a natural but an inevitable ground of Commerce Clause distinction.") (emphasis added; internal quotation marks and citation omitted).

This said, the dissent actually does completely ignore this distinction. In fact, so consciously does the dissent turn a blind eye to the Court's repeated distinction between regulations of economic and noneconomic activities that in its discursive treatment of Lopez the dissent does not as much as once—not once—cite to or quote even one of the score of references to this distinction in the Lopez opinions, except a single time inadvertently, see infra at 927 ("The representative effectiveness of state and federal governments would also be impaired if 'the Federal Government [were] to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of *commercial* activities.'") (quoting *Lopez*, 514 U.S. at 577, 115 S. Ct. 1624 (Kennedy, J., concurring))(emphasis added). *Only once (and then only in a quote from another case) does the dissent quote even the word "economic" from Lopez—a word that appears repeatedly throughout the several opinions in that case.*

Cases subsequent to *Lopez*, of course, reaffirm that congressional power under the substantially affects test is limited primarily to the regulation of economic or commercial activities. *See, e.g., United States v. Robertson*, 514 U.S. 669, 671, 115 S. Ct. 1732, 131 L.Ed.2d 714 (1995) (per curiam) ("The 'affecting commerce' test was developed in our jurisprudence to define the extent of Congress's power over purely *intra* state *commercial* activities that nonetheless have substantial *inter* state effects.") (second emphasis added).

Lopez, beginning with its holding in the very first paragraph of the opinion:

> The [GFSZA] neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce. We hold that the Act exceeds the authority of Congress "[t]o regulate Commerce . . . among the several states. . . ." U.S. Const., Art. I, § 8, cl. 3.

Lopez, 514 U.S. at 551, 115 S. Ct. 1624 (ellipses in original); *compare infra* at 917-18 (omitting second sentence and asserting that majority merely "contends" that this is the rule, while at the same time acknowledging that for this rule we rely upon quotation from *Lopez*). Far from constituting a "new" rule of law, this rule of law is the law of the land.[6]

B.

In contrast to the statutes that the Supreme Court has previously upheld as permissible regulations under the substantially affects test, *see Lopez*, 514 U.S. at 560, 115 S. Ct. 1624; *id.* at 580, 115 S. Ct. 1624 (Kennedy, J., concurring), but analogously to the Gun-Free School Zones Act, *see id.* at 551, 115 S. Ct. 1624 (majority),

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[6] Notwithstanding this seemingly unequivocal holding by the Court in *Lopez*, we do, nevertheless, proceed to address the possibility that Congress' power might well extend to regulating some noneconomic activities as well. *See infra* Part III.C. To the extent that we do consider such a possibility, *that* new rule would contemplate a congressional power under the Commerce Clause *broader*, rather than *narrower*, than that acknowledged by the Court in *Lopez*. Thus, in the end, the dissent's rhetorical ploy of charging us with creating a "new rule" rebounds upon itself with a vengeance.

section 13981 neither regulates an economic activity nor contains a jurisdictional element. Accordingly, it cannot be sustained on the authority of *Lopez*, nor any of the Court's previous Commerce Clause holdings, as a constitutional exercise of Congress' power to regulate interstate commerce.

1.

Appellants do not contend that section 13981 regulates economic activity. Nor could they. The statute does not regulate the manufacture, transport, or sale of goods, the provision of services, or any other sort of commercial transaction. Rather, it regulates violent crime motivated by gender animus. Not only is such conduct clearly not commercial, it is not even economic in any meaningful sense. While some violent crimes, such as robbery, may be economically motivated and thus at least arguably "economic" in a loose sense, section 13981 is not directed toward such crimes, but instead is expressly limited to "crime[s] of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender." 42 U.S.C. § 13981(d)(1); *accord id.* § 13981(e)(1) ("Nothing in this section entitles a person to a cause of action . . . for random acts of violence unrelated to gender or for acts that cannot be demonstrated, by a preponderance of the evidence, to be motivated by gender . . . ."); *see also* S. Rep. No. 103-138, at 52 n.61 (1993) (listing "absence of any other apparent motive" among circumstantial indicia of gender motivation). The statute thus explicitly excludes from its purview those violent crimes most likely to have an economic aspect—crimes arising solely from economic motives—and instead addresses violent crime arising

from the irrational motive of gender animus, a type of crime relatively unlikely to have any economic character at all.

That section 13981 may, on occasion, reach activity that arises in part from economic motives does not transform it into a statute regulating economic activity. For *Lopez* made clear that the Gun-Free School Zones Act regulated activity having "nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms," *Lopez*, 514 U.S. at 561, 115 S. Ct. 1624, even though a ban on guns in school zones would appear on its face to regulate activity considerably more likely to arise from economic motivation than is the narrowly circumscribed conduct regulated by section 13981, and even though, as the Supreme Court was doubtless aware, the defendant in *Lopez* itself admitted that his criminal conduct was economically motivated, *see United States v. Lopez*, 2 F.3d 1342, 1345 (5th Cir. 1993), *aff'd*, 514 U.S. 549, 115 S. Ct. 1624, 131 L.Ed.2d 626 (1995) (defendant charged with violating the GFSZA by delivering a gun to a student admitted that he had been promised $40 for the delivery).

Not only is violent crime motivated by gender animus not itself even arguably commercial or economic, it also lacks a meaningful connection with any particular, identifiable economic enterprise or transaction. *Cf. Hoffman*, 126 F.3d at 587-88 (finding that the Freedom of Access to Clinic Entrances Act of 1994 regulated conduct—protests—that "is closely and directly connected with an economic activity"—the operation of abortion clinics). Furthermore, unlike guns in school zones, violence arising from gender animus lacks even a

meaningful connection with any specific activity that might arguably be considered economic or commercial in the loosest sense. *Compare Lopez*, 514 U.S. at 628-30, 115 S. Ct. 1624 (Breyer, J., dissenting) (arguing that GFSZA regulated conduct closely connected with the operation of schools, an arguably commercial activity), *with Lopez*, 514 U.S. at 565, 115 S. Ct. 1624 (majority) (rejecting Justice Breyer's characterization of schools as commercial).

Finally, section 13981 cannot be sustained as "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Id.* at 561, 115 S. Ct. 1624. Although section 13981 addresses private discrimination, and other laws address discrimination in clearly economic contexts, the federal patchwork of antidiscrimination laws can hardly be characterized as a single, interdependent regulatory scheme aimed at commercial or economic activity. While such an understanding of section 13981 might be suggested by certain language in the committee reports, *see, e.g.*, H.R. Conf. Rep. No. 103-711, at 385 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1839, 1853 ("[C]urrent law provides a civil rights remedy for gender crimes committed in the workplace, but not for crimes of violence motivated by gender committed on the street or in the home."), section 13981 and Title VII—the statute to which the report apparently refers—cannot reasonably be said to constitute a unified statutory scheme. While the two statutes share a general concern with discrimination, they address different kinds of conduct that only occasionally overlap—gender-motivated violence on the one hand, employer discrimination on the other. Rather than creating an integrated regulatory scheme, each

statute is obviously written without regard for the concerns that animate the other. For example, section 13981 provides a remedy for gender-motivated violence in the workplace as well as on the street or at home, without regard for the victim's actual or potential employment status, and directly against the violent actor. Title VII, by contrast, provides a remedy only for gender discrimination that can be attributed to the fault of the employer, without regard to whether such discrimination takes the form of violent conduct, and it provides that remedy against the employer, who may or may not be the actual discriminator.

More importantly, even if the federal patchwork of antidiscrimination laws could be characterized as a single, interdependent regulatory scheme, section 13981 itself does not regulate even arguably economic activity. And it is clear from the context in which the *Lopez* Court observed that the Gun-Free School Zones Act was not "an essential part of a larger regulation of economic activity," *Lopez*, 514 U.S. at 561, 115 S. Ct. 1624, that the Court did not intend by this statement to authorize the regulation of activity lacking any meaningful economic nexus pursuant to a comprehensive statutory scheme that also regulates economic activity. Rather, it is plain that the Court's language references its discussion of *Wickard v. Filburn* in the preceding paragraph, and clarifies the constitutional basis of that decision. *See id.* at 560-61, 115 S. Ct. 1624 (discussing *Wickard v. Filburn*, 317 U.S. 111, 63 S. Ct. 82, 87 L.Ed. 122 (1942)). As the Court explained, *Wickard*, which it characterized as "perhaps the most far reaching example of Commerce Clause authority over intrastate activity," *id.* at 560, 115 S. Ct. 1624, upheld the application to homegrown wheat of a statute "designed to regulate

the volume of wheat moving in interstate and foreign commerce in order to avoid surpluses and shortages, and concomitant fluctuation in wheat prices." *Id.* Although the wheat at issue was not produced for sale, and therefore its production "m[ight] not be regarded as commerce" in the strictest sense, *Wickard*, 317 U.S. at 125, 63 S. Ct. 82 (*quoted in Lopez*, 514 U.S. at 556, 115 S. Ct. 1624), it was produced for human consumption, directly satisfying needs that would otherwise be filled by purchase or other commercial transaction, and was thus clearly economic in a general sense, *see Lopez*, 514 U.S. at 560, 115 S. Ct. 1624 ("Even *Wickard* . . . involved economic activity in a way that the possession of a gun in a school zone does not."). The Court's characterization of *Wickard* as a case involving economic activity thus makes explicit the Supreme Court's relatively broad understanding of such activity. *Id.* at 561, 115 S. Ct. 1624 (economic activity includes not just commercial transactions *per se*, but also "activities that arise out of or are connected with a commercial transaction"); *see also id.* at 573-74, 115 S. Ct. 1624 (Kennedy, J., concurring) (discussing Court's "practical conception of commercial regulation"); *id.* at 574, 115 S. Ct. 1624 (discussing "imprecision of content-based boundaries" and rejecting narrow "18th-century" understanding of commerce). And the Court's discussion reaffirms that when Congress enacts a general statutory framework regulating economic activity, its power is not limited to the regulation only of interstate economic activity, but extends to the regulation of purely intrastate *economic* activity as well. *Cf. United States v. Robertson*, 514 U.S. 669, 671, 115 S. Ct. 1732, 131 L.Ed.2d 714 (1995) (per curiam) ("The 'affecting commerce' test was developed in our jurisprudence to define the extent of Congress's power over purely *intra*state *commercial* activities that nonetheless have substantial *inter*state effects.") (second emphasis added); *Lopez*, 514 U.S. at 559, 115 S. Ct. 1624 ("[W]e have upheld a wide variety of *intrastate economic* activity where we have concluded that activity substantially affected *interstate* commerce." (emphases added)). But the decision does not, in such circumstances, authorize the regulation of intrastate conduct falling outside even the Court's relatively generous conception of economic activity.[7]

It follows, then, that section 13981, even more clearly than the Gun-Free School Zones Act struck down in *Lopez*, does not fall "within the fair ambit of the Court's practical conception of commercial regulation," *Lopez*, 514 U.S. at 573-74, 115 S. Ct. 1624 (Kennedy, J., concurring), but is, rather, a "statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms," *Lopez*, 514 U.S. at 561, 115 S. Ct. 1624 (major-

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[7] The Court's reaffirmation of *Wickard* in *Lopez* also distinguishes the present case from *United States v. Leshuk*, 65 F.3d 1105 (4th Cir. 1995), in which we upheld the federal prohibition on the manufacture of marijuana, even as applied to manufacture for personal use. Like the production of home-grown wheat, the manufacture of marijuana for personal use is an economic activity in a general sense. Further, such manufacture is prohibited pursuant to a comprehensive statutory scheme bearing on all aspects of the illegal-drug trade, which is assuredly both commercial and interstate. *Cf. id.* at 1112 ("In contrast to the firearm possession prohibited in the Gun Act, the intrastate drug activities regulated in the Drug Act are clearly tied to interstate commerce."). Thus, like the regulation of home-grown wheat, the prohibition of home-grown marijuana is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Lopez*, 514 U.S. at 561, 115 S. Ct. 1624.

ity). To hold otherwise would divest the words 'commerce' and 'economic' of any real meaning. *Cf. id.* at 565, 115 S. Ct. 1624 (rejecting definition of "commercial" activity broad enough to encompass the operation of schools as "lack[ing] any real limits because, depending on the level of generality, any activity can be looked upon as commercial"). Accordingly, section 13981 cannot be sustained on the authority of cases such as *Wickard*, which have upheld "regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." *Id.* at 561, 115 S. Ct. 1624.

2.

Similarly, and as appellants concede, section 13981 does not have an "express jurisdictional element which might limit its reach to a discrete set of [gender-motivated violent crimes] that additionally have an explicit connection with or effect on interstate commerce." *Id.* at 562, 115 S. Ct. 1624. Although the criminal statutes enacted by Congress as part of the Violence Against Women Act predicate liability on the crossing of state lines or the entering or leaving of Indian country, *see* 18 U.S.C. § 2261 (interstate domestic violence); *id.* § 2262 (interstate violation of a protective order), section 13981 includes no similar jurisdictional requirement, *see* 42 U.S.C. § 13981(b)-(c) (extending cause of action to "[a]ll persons within the United States" who are victims of gender-motivated crime). Nor does the statute include any language which could possibly be construed to constitute such a jurisdictional element. *Cf. United States v. Bass*, 404 U.S. 336, 349, 92 S. Ct. 515, 30 L.Ed.2d 488 (1971) (construing statute prohibiting felon from receiving, possessing, or transporting any firearm "in commerce or affecting commerce" to require additional nexus to *interstate* commerce); *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 118 S. Ct. 1952, 1956, 141 L.Ed.2d 215 (1998) (reasoning that unambiguous statute cannot be construed to avoid constitutional concerns). Accordingly, section 13981 cannot be sustained as a statute that contains a jurisdictional element "which would ensure, through case-by-case inquiry, that the [gender-motivated violent act] in question affects interstate commerce." *Lopez*, 514 U.S. at 561, 115 S. Ct. 1624; *cf. United States v. Cobb*, 144 F.3d 319, 321-22 (4th Cir. 1998); *United States v. Wells*, 98 F.3d 808, 810- 11 (4th Cir. 1996).

3.

Because section 13981 neither regulates an economic activity nor includes a jurisdictional element, it cannot be upheld on the authority of *Lopez* or any other Supreme Court holding demarcating the outer limits of Congress' power under the substantially affects test. *See Lopez*, 514 U.S. at 551, 115 S. Ct. 1624 ("The Act neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce. We hold that the Act exceeds the authority of Congress '[t]o regulate Commerce . . . among the several states. . . .'") (quoting U.S. Const. art. I, § 8, cl. 3) (ellipses in original).

C.

Even if these two categories of permissible congressional regulations demarcate not the absolute, but only the presumptive outer limits of congressional

power under the substantially affects test, such that Congress may regulate noneconomic activities absent jurisdictional elements in at least some circumstances—a proposition not only unsupported by Supreme Court holding, *see Lopez*, 514 U.S. at 560, 115 S. Ct. 1624; *id.* at 580, 115 S. Ct. 1624 (Kennedy, J., concurring), but seemingly eschewed by the Court in *Lopez*, *see, e.g.*, *Lopez*, 514 U.S. at 551, 560, 567, 115 S. Ct. 1624—we hold that the Commerce power does not extend so far as to support the regulation at issue in this case. A contrary holding would violate the "first principles" of a Constitution that establishes a federal government of enumerated powers, *id.* at 552, 115 S. Ct. 1624, principles that the *Lopez* Court believed so important to its constitutional analysis that it both began and ended its opinion with a full discussion of them, *id.* at 553-58, 564-68, 115 S. Ct. 1624, and that even the government is forced to concede lie at the heart of the Court's reasoning in *Lopez*, *see* Reply Br. of Intervenor United States at 14 ("The [*Lopez*] decision thus turned largely on the threat posed by the statute to principles of federalism."); Supp. Br. of Intervenor United States at 4 ("Federalism concerns were, of course, crucial in *Lopez*.").

Consistent with these principles, *Lopez* affirms that we must evaluate carefully the implications of our holdings upon our federal system of government and that we may not find an activity sufficiently related to interstate commerce to satisfy the substantially affects test in reliance upon arguments which, if accepted, would eliminate all limits on federal power and leave us "hard pressed to posit any activity by an individual that Congress is without power to regulate." *Lopez*, 514 U.S. at 564, 115 S. Ct. 1624; *see also id.* at 567, 115 S. Ct.

1624 (admonishing that courts are not to "pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States"). This is so especially when the regulated activity falls within an area of the law "where States historically have been sovereign," *id.* at 564, 115 S. Ct. 1624, and countenance of the asserted federal power would blur "the boundaries between the spheres of federal and state authority" and obscure "political responsibility," *id.* at 577, 115 S. Ct. 1624 (Kennedy, J. concurring).

Lopez, therefore, is emphatic that the scope of the interstate commerce power

> "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."

Lopez, 514 U.S. at 557, 115 S. Ct. 1624 (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37, 57 S. Ct. 615, 81 L.Ed. 893 (1937)); *see also id* . at 567, 115 S. Ct. 1624 (quoting *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 554, 55 S. Ct. 837, 79 L.Ed. 1570 (1935) (Cardozo, J., concurring)) (noting that everything affects interstate commerce to some degree, but rejecting "view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce" (internal quotation marks omitted)); *id.* at 567-68, 115 S. Ct. 1624 (refusing

to rely on arguments that obliterate "distinction between what is truly national and what is truly local"); *id.* at 580, 115 S. Ct. 1624 (Kennedy, J., concurring) ("In a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence, but we have not yet said the commerce power may reach so far.").

We could perhaps reconcile with these "first principles" of federalism a holding that Congress may regulate, even in the absence of jurisdictional elements, noneconomic activities that are related to interstate commerce in a manner that is clear, relatively direct, and distinct from the type of relationship that can be hypothesized to exist between every significant activity and interstate commerce. *See, e.g., United States v. Bird*, 124 F.3d 667, 677 n. 11 (5th Cir. 1997) ("[I]n determining whether the regulated intrastate activity substantially affects interstate commerce, 'substantial' must be understood to have reference not only to a quantitative measure but also to qualitative ones; effects which are too indirect, remote, or attenuated—or are seen only by piling 'inference upon inference'—are not substantial."); *cf. Hoffman*, 126 F.3d at 587 (holding that obstruction of abortion clinic entrances "is closely connected with, and has a direct and profound effect on, the interstate commercial market in reproductive health care services").

In this case, however, we can discern no such distinct nexus between violence motivated by gender animus and interstate commerce. Indeed, to sustain section 13981 as a constitutional exercise of the Commerce power, not only would we have to hold that congressional power under the substantially affects test

extends to the regulation of noneconomic activities in the absence of jurisdictional elements, but we would also have to conclude that violence motivated by gender animus substantially affects interstate commerce by relying on arguments that lack any principled limitations and would, if accepted, convert the power to regulate interstate commerce into a general police power.

Echoing the government's arguments in *Lopez*, the appellants argue that violence motivated by gender animus imposes medical and legal costs upon its victims; discourages those who fear such violence from traveling, working, or transacting business at times or in places that they consider unsafe (thereby deterring some interstate travel, employment, and transactions); and, as a result, inhibits the productivity of its actual or potential victims and decreases the supply and demand for interstate products. *See* Br. of Appellant Brzonkala at 37; *cf.* Supp. Br. of Appellant Brzonkala at 3 (noting effects of gender-motivated violence "on employment, health care, housing, criminal justice, interstate travel and consumer spending"). These arguments closely resemble, and are functionally equivalent to, the arguments advanced by the government in *Lopez*:

> The Government argues that possession of a firearm in a school zone may result in violent crime and that violent crime can be expected to affect the functioning of the national economy in two ways. First, the costs of violent crime are substantial, and, through the mechanism of insurance, those costs are spread throughout the population. Second, violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe. The Government also argues that the pre-

> sence of guns in schools poses a substantial threat to the educational process by threatening the learning environment. A handicapped educational process, in turn, will result in a less productive citizenry. That, in turn, would have an adverse effect on the Nation's economic well-being.

Lopez, 514 U.S. at 563-64, 115 S. Ct. 1624 (citations omitted). As in *Lopez*, appellants rely in essence on the costs of violent crime (including the deterrence of interstate travel and other similar interstate activities) and on decreased national productivity (including reduced employment, production, and demand), both of which ultimately affect the national economy, and presumably interstate commerce as well. But as the arguments are the same, so also does the Supreme Court's categorical ejection in *Lopez* of such attenuated links to interstate commerce gain control:

> We pause to consider the implications of the Government's arguments. The Government admits, under its "costs of crime" reasoning, that Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce. Similarly, under the Government's "national productivity" reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the theories that the Government presents in support of [the GFSZA], it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign.

> Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.

Id. at 564, 115 S. Ct. 1624 (citation omitted); *see also id.* at 600, 115 S. Ct. 1624 (Thomas, J., concurring) ("When asked at oral argument if there were any limits to the Commerce Clause, the government was at a loss for words.").[8]

It is unsurprising that appellants must resort to such arguments. Just as it is impossible to link violence

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[8] We reject Brzonkala's contention that the link here is more direct than in *Lopez* because section 13981 regulates actual violence rather than the possession of guns, which could, but would not necessarily, lead to violence. *See* Br. of Appellant Brzonkala at 38. As is apparent from their arguments, however, many of the economic effects of gender-motivated violence upon which the appellants rely arise, as in *Lopez*, not from actual violence, but rather from the fear of such violence. And, unlike in *Lopez*, in which the potential violence threatened education, a specific enterprise with clear links to the economy, *see Lopez*, 514 U.S. at 624, 115 S. Ct. 1624 (Breyer, J., dissenting) ("[T]he immediacy of the connection between education and the national economic well-being is documented by scholars and accepted by society at large in a way and to a degree that may not hold true for other social institutions. It must surely be the rare case, then, that a statute strikes at conduct that (when considered in the abstract) seems so removed from commerce, but which (practically speaking) has so significant an impact upon commerce."), gender-motivated violence affects no such specific enterprise. Thus, the manner in which any given act of gender-motivated violence affects the economy will depend on the specific circumstances of its victim. It is clear that here, as in *Lopez*, the relationship between the regulated conduct and interstate commerce is attenuated, and that any slight difference in the number of "steps" in the relationship is both artificial and insignificant.

motivated by gender animus with any particular, identifiable economic transaction or enterprise, *see supra* Part III.B.1, it is similarly impossible to link such violence with a particular interstate market or with any specific obstruction of interstate commerce. *Cf. Hoffman*, 126 F.3d at 587 (noting close and direct relationship between obstruction of abortion clinic entrances and the interstate commercial market in reproductive health care services); *Leshuk*, 65 F.3d at 1112 (noting relationship between the manufacture of marijuana and the interstate market in illegal drugs). Rather, to the extent violence motivated by gender animus affects interstate commerce, it does so only in the same way that any other significant problem does. Like violence in schools, violent crime generally, and many other less visible though still significant problems, violent crime motivated by gender animus undoubtedly imposes costs on, and decreases the productivity of, its victims. As with other such problems, to the extent violent crime motivated by gender animus is widespread, these costs and productivity losses in the aggregate will ultimately, though indirectly, affect the national economy. *Cf., e.g.*, Carol Krucoff, *Get Moving*, Wash. Post, Aug. 12, 1997, Health Section, at 12 (quoting director of Center for Disease Control as predicting annual savings of $4 billion in medical costs if only one-fourth of sedentary people were to exercise); 140 Cong. Rec. S14211 (1994) (statement of Sen. Hatfield) (estimating annual cost of accidents, medical problems, and reduced productivity, due to insomnia at between $92.5 and $107.5 billion). And, presumably, any adverse effect on the national economy will eventually also affect interstate commerce.

However, though the Supreme Court has, in cases such as *Wickard*, relied on relatively sweeping and permissive reasoning of this kind—including looking to the aggregate effects of entire classes of activities and indulging in attenuated chains of inferences—to find that intrastate *economic* activity substantially affects interstate commerce, *Lopez* clearly forecloses either reliance upon such authority or application of such analysis to sustain congressional regulation of *non-economic* activities such as the conduct reached by section 13981. *Compare Lopez*, 514 U.S. at 558, 115 S. Ct. 1624 ("[W]here *a general regulatory statute bears a substantial relation to commerce*, the *de minimis* character of individual instances arising under that statute is of no consequence." (citation omitted; emphasis added)), *with id.* at 561, 115 S. Ct. 1624 (explaining that, because GFSZA was "a criminal statute" having "nothing to do with 'commerce' or any sort of economic enterprise," it could not "be sustained under [the Court's] cases upholding regulation of *activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate*, substantially affects interstate commerce." (emphasis added)); *see also id.* at 567, 115 S. Ct. 1624 ("The possession of *a* gun in *a* local school zone is in no sense an *economic activity* that might, *through repetition elsewhere*, substantially affect any sort of interstate commerce." (emphases added)); *id.* at 563, 115 S. Ct. 1624 (similar); *id.* at 567, 115 S. Ct. 1624 (refusing to "pile inference upon inference" to find a substantial effect on interstate commerce); *id.* at 565, 115 S. Ct. 1624 (rejecting, as excessively permissive, Justice Breyer's three-step analysis of the relationship between gun-related crime and interstate commerce). To extend such reasoning beyond the context of statutes regulating economic

activities and uphold a statute regulating noneconomic activity merely because that activity, in the aggregate, has an attenuated, though real, effect on the economy, and therefore presumably on interstate commerce, would be effectively to remove all limits on federal authority, and to render unto Congress a police power impermissible under our Constitution. *See, e.g., id.* at 564, 115 S. Ct. 1624.[9]

This case, in fact, draws into sharp relief the sweeping implications for our federal system of government that would follow were we, in reliance on such reasoning, to extend congressional power under the substantially affects test to the regulation of noneconomic conduct remote from interstate commerce. For here, not only could the logic of the arguments upon which the appellants must rely justify congressional regulation of any significant activity, but the regulation in support of which these arguments are marshaled also intrudes upon areas of the law "to which

[9] Brzonkala selectively quotes from our opinion in *Hoffman* to support her argument that Congress may regulate violence motivated by gender animus, despite its noneconomic character, solely because of its ultimate economic effects, *see* Supp. Br. of Appellant Brzonkala at 4. That case, however, does not support her position. *Compare id.* (stating that this court has upheld regulation of an activity that "was 'closely connected with, and ha[d] a direct and profound effect on, the interstate commercial market.'") (quoting *Hoffman*, 126 F.3d at 586-87), *with Hoffman*, 126 F.3d at 587 (explaining that regulated activity "is closely connected with, and has a direct and profound effect on, the interstate commercial market *in reproductive health care services* " (emphasis added)). It is plain that we did not uphold the statute in *Hoffman* because the regulated conduct affected the national economy, but rather because it directly affected a specific interstate market and was also "closely and directly connected with an economic activity." *Id.*

States lay claim by right of history and expertise." *Id.* at 583, 115 S. Ct. 1624 (Kennedy, J., concurring). Thus, in this case, concerns of federalism, far from hypothetical, are immediate and concrete. First, although 42 U.S.C. § 13981(c) provides a civil remedy, the underlying conduct to which the remedy attaches is violent crime, *see id.* § 13981(d)(2), conduct that has traditionally been regulated by the States through their criminal codes and laws of intentional torts. *Compare id.* (defining "crime of violence" through incorporation of state and federal criminal law), *with Lopez*, 514 U.S. at 561 n. 3, 115 S. Ct. 1624 ("Under our federal system, the States possess primary authority for *defining and enforcing* the criminal law. . . . When Congress criminalizes conduct already denounced as criminal by the States, it effects a change in the sensitive relation between federal and state criminal jurisdiction." (citations and internal quotation marks omitted; emphasis added)). Appellants contend that section 13981 neither duplicates state criminal laws nor overrides these or any other state laws, but merely provides a civil remedy for conduct that is already proscribed by the States. Therefore, they argue, the provision does not implicate the sensitive balance between state and federal criminal authority.[10] Even were appellants'

[10] Appellants attempt to distinguish the GFSZA struck down in *Lopez* from section 13981 on the grounds that the former overrode state laws that would otherwise regulate guns in school zones. Appellants' characterization of the GFSZA, however, rests primarily on the misleading attribution to the Supreme Court of an opinion voiced only by President Bush, which the Court quotes in passing at the end of a lengthy footnote. *Compare* Br. of Intervenor United States at 31-32 ("*In the Court's view*, the Gun Free School Zones Act 'inappropriately overr[ode] legitimate state firearms laws with a new and unnecessary Federal law.' 115 S. Ct. at

description of section 13981 wholly accurate, we would reject their conclusion. For when the federal government provides a remedy for violent crime in addition to that provided by the States, it both involves itself in the punishment of such crime and increases the total penalty for such crime beyond that provided by the laws of the States.[11] Moreover, this federal involvement will inescapably lead to changes in the allocation of state law enforcement and judicial resources, and even in substantive state law, by altering the underlying enforcement realities against which all such allocative and legislative decisions are made. Thus, it is clear that the balance between federal and state responsibility for the control of violent crime is implicated not only by federal criminal statutes, but also by any federal sanction for such crime, even in the form

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1631 n. 3 (internal quotation marks and citation omitted).") (emphasis added), Supp. Br. of Intervenor United States at 5 (same), Reply Br. of Intervenor United States at 14 (similar), *and id.* at 15 (similar), *with Lopez*, 514 U.S. at 561 n. 3, 115 S. Ct. 1624 ("[*S*]*ee also* Statement of President George Bush on Signing the Crime Control Act of 1990, 26 Weekly Comp. of Pres. Doc. 1944, 1945 (Nov. 29, 1990) ('Most egregiously, section[922(q)] inappropriately overrides legitimate state firearms laws with a new and unnecessary Federal law. . . . .'") (emphasis added)). Furthermore, appellants' characterization of the GFSZA overlooks the actual character of that statute which, like section 13981, carefully preserved state laws by, *inter alia*, exempting from its prohibition possession of a gun licensed by a State or locality, 18 U.S.C. § 922(q)(2)(B)(ii), and preserving the rights of States and localities to establish gun-free school zones, *id.* § 922(q)(4); *see also id.* § 927 (expressing desire not to pre-empt state laws).

[11] In fact, section 13981 appears to have been specifically intended to enhance the penalty for the conduct that it regulates. *See* S. Rep. No. 103-138, at 50 (1993) ("Title III [section 13981] singles out for enhancement bias-inspired conduct. . . .").

of civil remedy. *See* Chief Justice William H. Rehnquist, *Welcoming Remarks: National Conference on State-Federal Judicial Relationships*, 78 Va. L. Rev. 1657, 1660 (1992) (noting section 13981's "potential to create needless friction and duplication among the state and federal systems"); *cf. Lopez*, 514 U.S. at 582, 115 S. Ct. 1624 (Kennedy, J., concurring) (approving argument that "injection of federal officials into local problems causes friction and diminishes accountability of state and local governments" (citation omitted)).

As its proclamation of a new, substantive right "to be free from crimes of violence motivated by gender" suggests, however, section 13981 does not merely provide a federal remedy for certain violent conduct defined by the States as felonious. 42 U.S.C. § 13981(b). Although the statute does provide a remedy for such conduct, it also provides a remedy for certain *federally defined* violent felonies, "whether or not those acts were committed in the special maritime, territorial, or prison jurisdiction of the United States." *Id.* § 13981(d)(2)(A). That is, under the plain language of the statute, a plaintiff may sue for gender-motivated violent conduct that would, if it occurred within an area of special federal jurisdiction, constitute a felony under the relatively comprehensive criminal code adopted by Congress to govern such areas, *see, e.g.*, 18 U.S.C. §§ 1111, 1118 (murder); *id.* § 1112 (manslaughter); *id.* § 1113 (attempted murder and manslaughter); *id.* § 113 (assault); *id.* § 114 (maiming); *id.* § 2241 (rape); *id.* § 1201 (kidnapping); *id.* § 81 (arson), even when the conduct occurs outside such a federal enclave, and even if the relevant federal law differs substantively from the law of the state in which the conduct occurs. Indeed, the apparent purpose of this provision is to create

a minimum level of substantive protection—tied to federal definitions of violent crimes and therefore subject to ready congressional calibration—that is unaffected by individual variation among the criminal laws of the several States.

Further, to the extent that section 13981's remedy is limited to violent acts constituting felonies as defined by state law, the statute provides a remedy for such conduct, "whether or not those acts have actually resulted in criminal charges, prosecution, or conviction," 42 U.S.C. § 13981(d)(2)(A); *id.* § 13981(e)(2) (same); *cf. id.* § 13981(d)(2)(B) (abrogating certain defenses that may exist under state law), and in many instances in which such violence would not be actionable under state tort law, *see id.* § 13981(c)-(d)(2)(B) (providing cause of action in cases in which a civil remedy may not exist under state law); 28 U.S.C. § 1658 (providing four-year statute of limitations which is considerably longer than the limitations periods for intentional torts in most States); *cf.* 42 U.S.C. § 1988(b) (successful section 13981 plaintiff may recover attorneys' fees).

Thus, not only does section 13981 provide a federal remedy for violent crime in addition to those remedies already provided by the laws of the States—thereby increasing the total penalty for such crime—it also provides such a remedy for violence that the States would leave unpunished, whether for reasons of state criminal-law policy, prosecutorial discretion, or state tort-law policy. And the statute deliberately disregards the limits of state criminal and civil law, purportedly in response to the States' failure properly to enforce their criminal and tort laws against gender-motivated violent criminals. *See infra* Parts III.D.2, IV. By responding

to this alleged failure of the States not with a remedy against the States or their officers, as would a civil rights statute properly enacted pursuant to Section 5 of the Fourteenth Amendment, *see infra* Part IV.A, but instead with a remedy against the violent criminals themselves, Congress not only has encroached upon the States' ability to determine when and how violent crime will be punished, *see Lopez*, 514 U.S. at 581, 115 S. Ct. 1624 (Kennedy, J., concurring) (noting States' abilities "as laboratories for experimentation to devise various solutions" for problems whose "best solution is far from clear"); *id.* at 583, 115 S. Ct. 1624 (GFSZA impermissibly "forecloses the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and experience"), but in so doing has blurred the boundary between federal and state responsibility for the deterrence and punishment of such crime. Accordingly, the citizens of the States will not know which sovereign to hold accountable for any failure to address adequately gender-motivated crimes of violence. *See Lopez*, 514 U.S. at 576-77, 115 S. Ct. 1624 (Kennedy, J., concurring) ("If . . . the Federal and State Governments are to control each other . . . and hold each other in check . . . citizens must have some means of knowing which of the two governments to hold accountable for the failure to perform a given function. Federalism serves to assign political responsibility, not to obscure it." (citation omitted)); *cf. Printz v. United States*, 521 U.S. 98, 117 S. Ct. 2365, 2377, 138 L.Ed.2d 914 (1997) (noting that the Constitution contemplates that "a State's government will represent and remain accountable to its own citizens"); *New York v. United States*, 505 U.S. 144, 168-69, 112 S. Ct. 2408, 120 L.Ed.2d 120 (1992) ("Accountability is thus diminished when, due to federal

coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation." (citation omitted)). Moreover, it is undisputed that a primary focus of section 13981 is domestic violence, a type of violence that, perhaps more than any other, has traditionally been regulated not by Congress, but by the several States. *See, e.g., infra* at 849-50 (discussing congressional findings on the extent and effects of domestic violence). Though such violence is not itself an object of family law—an area of law that clearly rests at the heart of the traditional authority of the States, *see Lopez*, 514 U.S. at 564, 115 S. Ct. 1624—issues of domestic violence frequently arise from the same facts that give rise to issues such as divorce and child custody, which lie at the very core of family law. Although section 13981 explicitly precludes the federal courts from exercising the supplemental jurisdiction that might otherwise extend to such matters, *see* 42 U.S.C. § 13981(e)(4), the fact that Congress found it necessary to include such a jurisdictional disclaimer confirms both the close factual proximity of the conduct regulated by section 13981 to the traditional objects of family law, *cf. United Mine Workers v. Gibbs*, 383 U.S. 715, 725, 86 S. Ct. 1130, 16 L.Ed.2d 218 (1966) (holding that supplemental jurisdiction extends to state law claims arising from the same "common nucleus of operative fact" as federal claims); 28 U.S.C. § 1367 (codifying this aspect of *Gibbs*), and the extent of section 13981's arrogation to the federal judiciary of jurisdiction over controversies that have always been resolved by the courts of the several States. In the words of the Chief Justice of the United States, section 13981 creates a "new private right of action so sweeping, that the legislation could involve the federal courts in a whole

host of domestic relations disputes." Chi. Daily L. Bull., Jan. 2, 1992, at 2 (quoting from Chief Justice Rehnquist's 1991 report on the federal judiciary).[12]

Section 13981 also sharply curtails the States' responsibility for regulating the relationships between family members by abrogating interspousal and intrafamily tort immunity, the marital rape exemption, and other defenses that may exist under state law by virtue of the relationship that exists between the violent actor and victim. *See* § 13981(d)(2)(B); *cf.* Br. of Intervenor United States at 12 (noting that, "as of 1990, seven states still did not include marital rape as a prosecutable offense, and an additional 26 states allowed prosecutions only under restricted circumstances"). Although Congress may well be correct in its judgment that such defenses represent regrettable public policy, the fact remains that these policy choices have traditionally been made not by Congress, but by the States. By entering into this most traditional area of state concern, Congress has not only substantially reduced the States' ability to calibrate the extent of

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[12] *See also* Chief Justice William H. Rehnquist, *Remarks at the Annual Meeting of the American Law Institute* (May 11, 1998) (listing the Violence Against Women Act as one of "the more notable examples" of "a series of laws passed by Congress that have expanded the jurisdiction of the federal courts" and that have raised the "prospect that our system will look more and more like the French government, where even the most minor details are ordained by the national government in Paris"); *see generally* Chief Justice William H. Rehnquist, *The 1998 Year-End Report of the Federal Judiciary* (January 1999) ("The trend to federalize crimes that traditionally have been handled in state courts not only is taxing the Judiciary's resources and affecting its budget needs, but it also threatens to change entirely the nature of our federal system.").

judicial supervision of intrafamily violence, *see Lopez*, 514 U.S. at 581, 115 S. Ct. 1624 (Kennedy, J., concurring), but has also substantially obscured the boundaries of political responsibility, freeing those States that would deny a remedy in such circumstances from accountability for the policy choices they have made, *see id.* at 576-77, 115 S. Ct. 1624.

The sweeping intrusion of section 13981 into these areas of traditional state concern well illustrates the essentially limitless nature of congressional power that would follow if we were to accept, as sufficient to justify federal regulation under the Commerce Clause, the type of connection with interstate commerce on which appellants rely in this case. Under such an understanding, the only conceivable limit on congressional power to regulate an activity would be the significance of that activity, because any significant activity or serious problem will have an ultimate, though indirect, effect upon the economy, and therefore, at least presumptively, upon interstate commerce as well. While we do not question the significance of the problems posed by violence arising from gender animus, *Lopez* confirms that such significance, standing alone, simply does not provide a meaningful limitation on federal power, and that a problem does not become a constitutionally permissible object of congressional regulation under the Commerce Clause merely because it is serious. *See Lopez*, 514 U.S. at 565, 115 S. Ct. 1624 (rejecting Justice Breyer's argument that because "gun-related violence is a serious problem" with an ultimate effect on "trade and commerce," it may be regulated under the Commerce Clause). To hold otherwise would require us to adopt a purely quantitative view of the substantially affects test that would, in light of the

relative institutional competencies of the legislature and the judiciary, be difficult to square either with the *Lopez* Court's clarification of this test as "ultimately a judicial rather than a legislative question," *id.* at 557 n.2, 115 S. Ct. 1624 (citation omitted), or with the "independent evaluation of constitutionality under the Commerce Clause" that *Lopez* requires of the courts, *id.* at 562, 115 S. Ct. 1624; *see also Bird*, 124 F.3d at 677 n. 11 (noting qualitative aspects of substantially affects test under *Lopez*). As this case illustrates, to adopt such an understanding of Congress' power to regulate interstate commerce would be to extend federal control to a vast range of problems falling within even the most traditional areas of state concern—problems such as violent crime generally, educational shortcomings, and even divorce, all of which are significant and as a result unquestionably affect the economy and ultimately interstate commerce. *Cf. Lopez*, 514 U.S. at 561 n. 3, 115 S. Ct. 1624 ("Under our federal system, the States possess primary authority for defining and enforcing the criminal law.") (citation omitted); *Northern Sec. Co. v. United States*, 193 U.S. 197, 402, 24 S. Ct. 436, 48 L.Ed. 679 (1904) (Holmes, J., dissenting) ("Commerce depends upon population, but Congress could not, on that ground, undertake to regulate marriage and divorce."). Such a sweeping interpretation of the Congress' power would arrogate to the federal government control of every area of activity that matters, reserving to the States authority over only the trivial and the insignificant.

After *Lopez*, it is simply insufficient to contend, as does the dissent, that principles of federalism are implicated *only* if a federal law "*directly supersede[s]* official state action in an area of *traditional state*

concern." *See infra* at 930; *see also id.* at 928 (asserting that "*Lopez* stands for the proposition that Commerce Clause legislation may be unconstitutional if it directly supersedes official state action in an area of traditional state concern"); *id.* at 930 ("When a federal statute directly supersedes official state action in an area of traditional state concern, then (and only then) may a court properly consider whether the rationale supporting the statute contains an inherent limiting principle."). Plainly put, neither the language nor the logic of *Lopez* permits, much less supports, such a parsimonious view of the rights of the States in our federal system. If anything, the Court in *Lopez*, as it has been over the past ten years or so, was at pains to express quite the opposite view, especially where, as here, the reasoning advanced in support of a given federal intrusion upon the prerogatives of the States would, if summoned, support a power in the Congress that is, for all intents and purposes, without limit. *See, e.g., Lopez*, 514 U.S. at 564, 115 S. Ct. 1624 ("Under the theories that the Government presents . . . it is difficult to perceive any limitation on federal power, even in areas where States historically have been sovereign."); *id.* at 567, 115 S. Ct. 1624 (rejecting reasoning "that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States"); *id.* at 580, 115 S. Ct. 1624 (Kennedy, J., concurring) ("[W]e must inquire whether the exercise of national power seeks to intrude upon an area of traditional state concern."); *id.* at 583, 115 S. Ct. 1624 (noting "tendency of this statute to displace state regulation in areas of traditional state concern" and explaining that "[w]hile the intrusion on state sovereignty may not be as severe in this instance as in some of our recent

Tenth Amendment cases, the intrusion is nonetheless significant" and "contradicts the federal balance").

In short, to hold that an attenuated and indirect relationship with interstate commerce of the sort asserted here is sufficient to bring within Congress' power to regulate such commerce the punishment of gender-motivated violent crime, an activity that has nothing to do with commerce and that has traditionally been regulated by the States, we would have to do what the Supreme Court has never done, and what the *Lopez* Court admonished us not to do: "pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States" and "conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, and that there never will be a distinction between what is truly national and what is truly local." *Id.* at 567-68, 115 S. Ct. 1624 (citations omitted). Like the Supreme Court, "[t]his we are unwilling to do." *Id.* at 568, 115 S. Ct. 1624.

D.

To the extent that appellants even acknowledge the precedential force of *Lopez*, *see infra* Part III.E, they attempt to distinguish that decision primarily in two ways. First, they argue that here, unlike in *Lopez*, the relationship between the regulated activity and interstate commerce upon which they rely is not just identified by them alone, but is also documented by congressional findings to which we are obliged to defer. Second, they contend that section 13981 regulates conduct implicating civil rights, that civil rights is an area of manifest federal concern, and that therefore the

regulation of the conduct here, despite its noneconomic character and its lack of a close connection to interstate commerce, does not offend the first principles of federalism. Appellants argue that these distinctions are sufficient grounds for upholding the constitutionality of section 13981 under the Commerce Clause. We disagree.

1.

It is true that section 13981, unlike the Gun-Free School Zones Act as originally enacted, is accompanied by congressional findings regarding the extent and effects of the problem it addresses. However, though Congress' legislative expertise is entitled to deference, *Lopez* is unmistakable that our deference is not, and cannot be, absolute. And the principles articulated in that decision leave little doubt that the findings here are simply inadequate to sustain section 13981 as a constitutional exercise of Congress' power under Article I, Section 8.

(a)

The *Lopez* Court acknowledged that "legislative findings, and indeed even congressional committee findings," may assist the courts in determining constitutionality under the Commerce Clause. *Lopez*, 514 U.S. at 562, 115 S. Ct. 1624; *see also id.* at 563, 115 S. Ct. 1624 (noting the lack of findings that "would enable [the Court] to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye"). The Court emphasized, however, that "[s]imply because Congress may conclude that a particular activity substantially affects

interstate commerce does not necessarily make it so." *Id.* at 557 n. 2, 115 S. Ct. 1624 (citation omitted). Rather, because the question of whether particular activities "affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question," *id.*, we cannot sustain a statute solely on the strength of a congressional finding as to the factual relationship between a particular activity and interstate commerce. Instead, we must undertake an "independent evaluation" to determine whether, as a legal matter, the substantially affects test is satisfied. *Id.* at 562, 115 S. Ct. 1624 (noting that congressional findings may be considered "as *part* of our *independent* evaluation of constitutionality under the Commerce Clause" (emphases added)); *cf. id.* at 563, 115 S. Ct. 1624 (stating that congressional findings "enable us *to evaluate* the legislative judgment that the activity in question substantially affected interstate commerce" (emphasis added)); *id.* at 559, 115 S. Ct. 1624 ("[W]e have upheld a variety of congressional Acts regulating intrastate economic activity where *we* have concluded that the activity substantially affected interstate commerce." (emphasis added)).

Appellants concede, as they must, that, under *Lopez*, findings are not "conclusive," Reply Br. of Intervenor United States at 12, "that a court is not bound by congressional findings," Supp. Br. of Intervenor United States at 4, that "[C]ongress cannot, by fiat, establish a substantial effect on interstate commerce where none exists," *id.*, and that "a court must conduct an independent investigation," *id.*; *cf.* Br. of Appellant Brzonkala at 35 n. 29 (acknowledging "[t]he *Lopez* decision's rec-

ognition that a law's constitutionality ultimately is a judicial decision").

Despite such lip service to the Court's explicit pronouncements in *Lopez* that congressional findings are not conclusive of the constitutional inquiry, however, appellants contend that the Gun-Free School Zones Act's primary and dispositive flaw was that Congress did not *document* the connection between the conduct regulated by that Act and interstate commerce. In support of this contention, appellants cite the *Lopez* Court's cursory mention of the lack of congressional findings that might have "enable[d] [it] to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye," *Lopez*, 514 U.S. at 563, 115 S. Ct. 1624. They then construe that Court's refusal, four pages later, to sustain the government's contentions in that case by "pil[ing] inference on inference," *id.* at 567, 115 S. Ct. 1624, as referring to the lack of congressional documentation of the regulated activity's affect on interstate commerce.[13] According to appellants, had

[13] *See, e.g.*, Supp. Br. of Intervenor United States at 3 (contending that because Congress failed to identify nexus between regulated conduct and interstate commerce or provide "findings of any sort," "the effect of gun possession on interstate commerce could be posited only hypothetically," and "it would be necessary to 'pile inference upon inference' to sustain the statute") (quoting *Lopez*, 514 U.S. at 567, 115 S. Ct. 1624); Reply Br. of Intervenor United States at 12 ("The *Lopez* Court found it could sustain the Gun Free School Zones Act only by 'pil[ing] inference on inference,' *Lopez*, 115 S. Ct. at 1634, and explicitly noted the absence of any legislative findings that would have made the inferential process unnecessary. *Id.* at 1631."); Br. of Intervenor United States at 19 (similar); *cf.* Br. of Appellant Brzonkala at 38 (similar).

Congress provided such documentation, the Court could have sustained the statute without resorting to inference, and would in fact have done so.[14]

Lopez, however, cannot reasonably be understood to have turned on a mere lack of documentation of the effects of the regulated conduct on interstate commerce. Although the Supreme Court noted that findings could aid it in identifying an effect on interstate commerce that was not "visible to the naked eye," *Lopez*, 514 U.S. at 563, 115 S. Ct. 1624, the Court never indicated that it did not understand the relationship alleged to exist between guns in school zones and interstate commerce. While the Court did not consult legislative materials to illuminate the contours of this relationship, both the government and the principal dissent detailed how such guns affected interstate commerce. *See, e.g., id.* at 618-25, 115 S. Ct. 1624 (Breyer, J., dissenting). The Court's lucid recitation of the arguments of both the government, *see Lopez*, 514 U.S. at 563-64, 115 S. Ct. 1624 (majority) (reciting government's arguments), and the principal dissent, *id.* at 564-66, 115 S. Ct. 1624 (reciting Justice Breyer's arguments), leaves no doubt that it understood the nature of

[14] *See, e.g.*, Reply Br. of Intervenor United States at 12 n. 8 ("The point for the *Lopez* majority . . . was that its inferential task was not lightened by the presence of legislative findings such as those that are present here. Defendant's insistence that the outcome in *Lopez* would have been identical regardless of the legislative record before the Court is flatly at odds with the Court's declaration and its reasoning."); *cf. id.* at 12 (noting "critical" nature of findings); *id.* at 11 ("Contrary to defendants' contention here, legislative findings are of key significance.")

the relationship asserted. Further, the Court nowhere questioned the factual validity of the arguments made by either the government or Justice Breyer. *See id.* at 563-66, 115 S. Ct. 1624; *see also id.* ("Although Justice Breyer argues that acceptance of the Government's rationale would not authorize a general police power, he is unable to identify any activity that the States may regulate but Congress may not."); *id.* at 600, 115 S. Ct. 1624 (Thomas, J., concurring) (same).

Had the Court's decision turned on either lack of understanding or skepticism of the factual link between guns in school zones and interstate commerce, the Court's failure to consult the massive documentation available regarding those effects would have been inexplicable. Not only did the Court have available before it a wealth of legislative, governmental, and other materials documenting these links, *see, e.g., id.* at 631-34, 115 S. Ct. 1624 (Breyer, J., dissenting) (appendix listing numerous hearings, transcripts, committee reports, and other legislative materials bearing directly on these links); *id.* at 634-36, 115 S. Ct. 1624 (listing other governmental materials); *id.* at 636-44, 115 S. Ct. 1624 (listing other readily available materials), it also had before it explicit congressional findings that (1) crime was a nationwide problem exacerbated by the interstate movement of drugs, guns, and criminal gangs; (2) firearms and their component parts move easily in interstate commerce, and guns have been found in increasing numbers around schools; (3) citizens fear to travel through certain parts of the country due to concern about violent crime and gun violence; (4) the occurrence of violent crime in school zones has resulted in a decline in the quality of education, which in turn has had an adverse impact on interstate commerce; and

(5) the States are unable to curb gun-related crime on their own. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320904, 108 Stat. 1796, 2125. To be sure, these findings had been added to the statute after its adoption, and the government did not rely on them "in the strict sense of the word." *Lopez*, 514 U.S. at 563 n.4, 115 S. Ct. 1624 (citation omitted). But had the Court desired only legislative corroboration of the government's arguments, it could easily have consulted these findings, and presumably would have done so. As the government explained, "at a very minimum [the findings] indicate that reasons can be identified why Congress wanted to regulate this particular activity." *Id.* (citation omitted).

The Court's indifference both to these findings and to the massive documentation assembled by the principal dissent confirms that the Court did not reject as insufficient the relationship between guns in school zones and interstate commerce asserted by the government and the dissents because it deemed that relationship opaque or dubious, but rather that it did so for the reason that it explicitly stated: accepting such indirect and attenuated relationships as sufficient to justify congressional regulation would render unto Congress a power so sweeping as to leave the Court "hard pressed to posit any activity by any individual that Congress is without power to regulate." *Lopez*, 514 U.S. at 564, 115 S. Ct. 1624.

It is clear, therefore, that appellants fundamentally misunderstand the *Lopez* Court's refusal "to pile inference upon inference" to sustain the Gun-Free School Zones Act. *Id.* at 567, 115 S. Ct. 1624. When quoted in full rather than as an isolated fragment—as appellants

would have it—the Court's statement is of unmistakable import:

> To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose anything not enumerated, and that there never will be a distinction between what is truly national and what is truly local. This we are unwilling to do.

Id. at 567-68, 115 S. Ct. 1624 (citations omitted). Rather than referring to the Court's passing mention of the original statute's lack of findings four pages earlier, this statement instead represents a powerful summary of an intervening three-and-a-half-page discussion emphatically reaffirming the existence of meaningful substantive limits on congressional authority under the Commerce Clause.

The indisputable abundance of the materials available to the Court in *Lopez* detailing the real, though indirect, effect of guns in school zones on interstate commerce strongly suggests that appellants' argument really is not that *Lopez* turned on a simple lack of documentation, but rather that it turned on a lack of legislative formalities. Thus, despite their concessions,

see supra at 845, it is evident that appellants regard legislative formalities such as findings as dispositive—at least as a practical matter—of whether an activity may be regulated under the substantially affects test. In fairness to them, however, they are far more abashed in their reliance upon congressional findings than are our dissenting colleagues, who are quite candid about their prostrate deference to congressional pronouncements. The dissenters begin and end their Commerce Clause analysis by posing the dispositive question as "whether . . . Congress exceeded its constitutional authority in enacting" section 13981. In the immediately following two sentences, they then provide what, from their following discussion, we know is for them the answer—namely, that Congress did not exceed its authority, *because* "Congress directly addressed this very question" and on the basis of findings and evidence concluded that, in fact, it did act constitutionally in enacting section 13981. *See infra* at 911.[15]

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[15] *See also infra* at 923 ("Where Congress has supported a statute with an explicitly articulated rationale asserting its constitutionality, [ ] invalidation . . . [is] a direct repudiation of Congress's full authority."); *id.* at 933 ("No one doubts the validity of any of these principles [of federalism and enumerated powers]. The critical question, however, is who decides how they are to be upheld. The Constitution itself provides a clear and specific answer to that question. It allocates the fundamental power of government—the power of legislation—to Congress."); *id.* at 923 ("The statute itself articulates the *existence* of a congressional judgment of constitutionality, while findings articulate the *content* of that judgment. We defer to the former . . . and we grant an additional measure of deference to the latter. . . ."); *id.* at 916-17 ("Given Congress's clear finding that gender-based violence has a substantial effect on interstate commerce, the compelling evidence in the legislative record supporting that finding, and the fact that the challenged statute in no way interferes with state action on

And only as an after thought (literally)—and, for it, an empty one at that, *see id.* at 859-61 does the dissent even acknowledge that the courts must ensure compliance with the Constitution. *Id.* at 911-12, 921. So far from *Lopez*, appellants would not even dare to venture.

Appellants' position (and *a fortiori* the dissent's), however, flatly contradicts the Supreme Court's opinion in *Lopez*. While an understanding of legislative formalities as dispositive in practice if not theory would follow from the reasoning initially employed by the *Fifth Circuit* in striking down the Gun-Free School Zones Act, *see Lopez*, 2 F.3d at 1363 ("Practically speaking, [congressional] findings almost always end the matter."); *id.* at 1365-66 (holding that Congress "ha[d] not taken the steps necessary to demonstrate that such an exercise of power is within the scope of the Commerce Clause"); *Lopez*, 514 U.S. at 552, 115 S. Ct. 1624 (noting that Fifth Circuit held the Act invalid "in light of what it characterized as insufficient congressional findings and legislative history"), such an understanding cannot be reconciled with the much different analysis of the statute's constitutionality undertaken by the Supreme Court. *See, e.g., id.* at 551, 115 S. Ct. 1624 ("The Act neither regulates a commercial activity nor

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matters of traditional state concern, it seems to me that a court can only uphold Subtitle C."); *id.* at 918-19 (criticizing majority for "fly speck[ing] congressional judgments"); *id.* at 919-20 (criticizing majority for claiming that gender-based violence lacks a meaningful connection to economic activities, given that "Congress expressly found that gender-based violence does affect specific economic activities. . . ."); *id.* at 923 ("[N]othing in *Lopez* suggests that when Congress has considered a matter and made a rational finding of constitutionality—let alone an explicit finding based on a massive congressional record, as in this case—a court should not defer to that finding.").

contains a requirement that the possession be connected in any way to interstate commerce. We hold that the Act exceeds the authority of Congress to regulate Commerce . . . among the several States. . . ." (internal quotation marks omitted)).

To read the Supreme Court's decision as if it were the Fifth Circuit's, one would have to dismiss as disingenuous the Supreme Court's explicit statements that "[s]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so," *id.* at 557 n. 2, 115 S. Ct. 1624 (internal quotation marks and citation omitted); that "[w]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question," *id.*; and even that "Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce," *id.* at 562, 115 S. Ct. 1624. Further, the Court's self-described "independent evaluation of constitutionality under the Commerce Clause," *id.*, together with its purported consideration of the government's arguments regarding the relationship between guns in school zones and interstate commerce, *id.* at 563-68, 115 S. Ct. 1624, would likewise have to be disregarded as mere contrivance. And, most importantly, the Supreme Court's definitive invocation of the first principles of federalism as limitations on congressional power would have to be consigned to platitude, for legislative formalities are at most a mere procedural limit on congressional power. *Cf. Seminole Tribe v. Florida*, 517 U.S. 44, 64, 116 S. Ct. 1114, 134 L.Ed.2d 252 (1996) ("If *Hans* means only that federal-question suits for money damages against the

States cannot be brought in federal court unless Congress clearly says so, it means nothing at all.") (quoting *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 36, 109 S. Ct. 2273, 105 L.Ed.2d 1 (1989) (Scalia, J., concurring in part and dissenting in part)). In short, to read *Lopez* as elevating legislative formality to a position dispositive of the constitutional inquiry, even as a practical matter, one would have to ignore everything the Court said in that opinion, other than its single, passing allusion to the statute's lack of findings.

Had the Court in *Lopez* intended so to elevate the existence or non-existence of findings or a formal legislative record, its holding that the Gun-Free School Zones Act exceeded Congress' power under the Commerce Clause would have constituted not a substantive limitation on congressional power, but rather a mere procedural hurdle—in essence, a remand to Congress to make formal findings or compile a formal record. Not only would a judicial mandate that Congress construct a proper paper trail of the sort that might be demanded of an administrative agency ill befit the dignity of the Legislature, *see, e.g., Turner Broad. Sys. v. FCC*, 512 U.S. 622, 666, 114 S. Ct. 2445, 129 L.Ed.2d 497 (1994) (opinion of Kennedy, J.) ("Congress is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review."); *City of Boerne*, 117 S. Ct. at 2170 ("Judicial deference, in most cases, is based not on the state of the legislative record Congress compiles but on due regard for the decision of the body constitutionally appointed to decide. As a general matter, it is for Congress to determine the method by which it will reach a decision." (internal quotation marks and citation omitted)); *cf. Maryland v. Wirtz*, 392 U.S. 183,

190 n. 13, 88 S. Ct. 2017, 20 L.Ed.2d 1020 (1968) ("We are not concerned with the manner in which Congress reached its factual conclusions."), but had the Supreme Court intended to impose such a procedural requirement, *Lopez* would have been an unusual case in which to announce it. For after the Fifth Circuit's decision, but before the Supreme Court's, Congress had already amended the Gun-Free School Zones Act to include "congressional findings regarding the effects of firearm possession in and around schools upon interstate and foreign commerce." *Lopez*, 514 U.S. at 563 n. 4, 115 S. Ct. 1624. The Supreme Court's holding that the Gun-Free School Zones Act was unconstitutional, accordingly, would have constituted little more than historical irrelevancy. Surely we cannot conclude that the *Lopez* Court intended to authorize the enforcement of the Gun-Free School Zones Act against those who, unlike the defendant in *Lopez*, violated the statute after it was amended in 1994 to include explicit congressional findings. Not only did the Court never even hint that the addition of findings solved, even prospectively, the problems it identified with the statute, but such an inference would also be difficult to reconcile with the Court's manifest lack of interest in the subsequently adopted findings. *See id.* at 563 n. 4, 115 S. Ct. 1624 (mentioning these findings only briefly in a footnote). Finally, if there were any doubt, despite the government's litigation position in this proceeding, neither Congress nor the government has so interpreted *Lopez*, as evidenced by the fact that, in response to that decision, Congress, at the Administration's urging, amended 18 U.S.C. § 922(q) by adding a jurisdictional element. *Compare* 18 U.S.C. § 922(q)(2)(A) (limiting statute's reach to prohibition of possession, in a school zone, of a firearm "that has moved in or that otherwise

affects interstate or foreign commerce"), *with* 31 Weekly Comp. Pres. Doc. 809 (May 15, 1995) (presenting Attorney General Reno's "analysis of *Lopez*" and recommended "legislative solution" of limiting statute's reach by adding jurisdictional element, "thereby bring[ing] it within the Congress' Commerce Clause authority").

Lopez, then, cannot reasonably be understood to contemplate absolute deference to legislative findings, either in theory or in practice. As the opinion instructs, such findings can clarify the *factual* relationship that exists between conduct that a statute seeks to regulate and interstate commerce. However, because constitutionality under the substantially affects test turns ultimately not on mere empirical fact but on law, unless the relationship so clarified is sufficient to satisfy the *legal* requirements of that test, the statute cannot be sustained.

(b)

When viewed not with absolute deference, but rather "as part of our independent evaluation of constitutionality under the Commerce Clause," *Lopez*, 514 U.S. at 562, 115 S. Ct. 1624, it is apparent that the congressional findings on which appellants rely cannot establish that section 13981 is a permissible regulation under the substantially affects test.

In the first place, although the appellants cite hearings and committee reports from at least three different Congresses—raising the reasonable question of which Congress found what, a question we would be forced to pursue if we believed findings constituted a formal procedural requirement—many of the congressional findings on which the appellants rely describe only indirectly the relationship between gender-motivated violent crime and interstate commerce. Although the committee reports recite numerous findings that violence against women generally, and domestic violence in particular, are significant problems, *see, e.g.*, S. Rep. No. 103-138, at 38 (1993) (rape and murder statistics); *id.* at 41-42 (family violence); H.R. Rep. No. 103-395, at 26 (1993) (domestic violence statistics); S. Rep. No. 101-545, at 37 (1990) (same); H.R. Rep. No. 103-395, at 25 (violent crime generally), and even that domestic violence and other violence against women affects the economy, *see, e.g.*, S. Rep. No. 103-138, at 41 (estimating "health care, criminal justice and other social costs of domestic violence" at $5 to $10 billion annually); S. Rep. No. 101-545, at 33 ("Partial estimates show that violent crime against women costs this country at least 3 billion . . . dollars a year."), neither of these propositions clarifies the impact of *gender-motivated* violence against women—as opposed to all violence against women—on the economy. *Cf., e.g.*, 42 U.S.C. § 13981(e)(1) (excluding from statute's purview "random acts of violence unrelated to gender" and "acts that cannot be demonstrated, by a preponderance of the evidence, to be motivated by gender"); S. Rep. No. 102-197, at 69 (1991) (statement of Sen. Biden) ("Title III [section 13981] does not cover everyday domestic violence cases. . . . This is stated clearly in the committee report and it is the only fair reading of the statutory language."). The findings linking this more narrow class of violence to the economy are substantially more modest. *See, e.g.*, S. Rep. No. 103-138, at 54 ("Gender-based violence bars its most likely targets—women—from full partic[ipation] in the national economy."); *id.* ("Even the fear of gender-based

violence affects the economy. . . ."). Not even these findings, however, describe the effects of gender-motivated violence on *interstate commerce*, let alone do they constitute a legislative judgment that gender-motivated violence substantially affects interstate commerce.

Ultimately, appellants cite only two congressional findings regarding the effects of gender-motivated violence on interstate commerce. First, they cite a House Conference Report finding, in a single conclusory sentence, that "crimes of violence motivated by gender have a substantial adverse effect on interstate commerce, by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved, in interstate commerce; crimes of violence motivated by gender have a substantial adverse effect on interstate commerce, by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products." H.R. Conf. Rep. No. 103-711, at 385 (1994), *reprinted in* 1994 U.S. Code Cong. & Admin. News 1839, 1853. Second, they cite a Senate report finding that "[g]ender-based violent crimes meet the *modest threshold* required by the Commerce Clause. Gender-based crimes and the fear of gender-based crimes restricts movement, reduces employment opportunities, increases health expenditures, and reduces consumer spending, all of which *affect* interstate commerce and the national economy." S. Rep. No. 103-138, at 54 (emphases added).[16]

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[16] Although appellants cite this latter finding, they evince an understandable—though barely excusable—reluctance to quote it in its entirety. *Compare* Br. of Intervenor United States at 8 ("*See also* S. Rep. No. 103-138 at 54 ('[g]ender-based crimes and the fear of gender-based crimes restrict[] movement, reduce[] emploment opportunities, increase[] health expenditures, and reduce[] consumer spending')."), *and id.* at 30 (same), *with* Supp. Br. of Intervenor United States at 1-2 (" '[G]ender-based crimes and the fear of gender-based crimes restrict[] movement, reduce[] employment opportunities, increase[] health expenditures, and reduce[] consumer spending, all of which affect interstate commerce and the national economy.' S. Rep. No. 103-138, at 54 (1993).").

Although these two lone findings do recite effects of gender-motivated violence on interstate commerce as a factual matter, to the extent these findings are intended also as a legal conclusion that such violence is sufficiently related to interstate commerce to satisfy the substantially affects test, under *Lopez* we cannot accept this conclusion uncritically. This is especially so where, as here, Congress' findings themselves reveal a profound misunderstanding of the constitutionally permissible scope of its Commerce power under Article I, Section 8. The Senate initially found *not* that gender-motivated violence *substantially affects* interstate commerce, but only that gender-based violence *affects* interstate commerce *and the national economy* sufficiently to satisfy what it described as the "modest threshold required by the Commerce Clause." And even this finding must be considered in light of its simultaneously and explicitly stated belief that "[t]he Commerce Clause is a broad grant of power allowing Congress to reach conduct that has *even the slightest effect* on interstate commerce." S. Rep. No. 138, at 54 (emphasis added); *cf. Lopez*, 514 U.S. at 559, 115 S. Ct. 1624 ("We conclude, consistent with the great weight of our case law, that the proper test requires an analysis of whether the regulated activity '*substantially affects*'

interstate commerce." (emphasis added)). That this misapprehension of the scope of the power to regulate interstate commerce was not confined to the Senate is confirmed by section 13981's express statutory purpose "to protect the civil rights of victims of gender motivated violence and to promote *public safety, health, and activities affecting interstate commerce.*" 42 U.S.C. § 13981(a) (emphasis added). Not only does the explicit language of this provision misstate the scope of Congress' power under the Commerce Clause, but it also assumes a general power to regulate health and safety—the very essence of the sort of police power the Constitution denies to the federal government and reserves to the States. *Compare* U.S. Const. art. I, § 8 (enumerated powers of Congress), *with id.* amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."), *and City of Boerne*, 117 S. Ct. at 2171 (noting "the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens").

Therefore, as a court, we cannot avoid our duty to evaluate independently the constitutionality of section 13981 under the Commerce Clause.

The legislative record in this case, considered as a whole, shows that violence against women is a sobering problem and also that such violence ultimately does take a toll on the national economy. The record also supports an inference that some portion of this violence, and the toll that it exacts, is attributable to gender animus. And Congress' specific findings regarding the relationship between gender-motivated violence and interstate commerce, though somewhat conclusory, *cf. Lopez*, 514 U.S. at 612 n. 2, 115 S. Ct. 1624 (Souter, J.,

dissenting) (noting that the findings added by Congress to the GFSZA were made "at such a conclusory level of generality as to add virtually nothing to the record"), depict the manner in which such violence affects interstate commerce—primarily by imposing medical, legal, and other costs upon its victims; by discouraging those who fear such violence from traveling, working, or transacting business at times or in places that they deem unsafe (thereby deterring some interstate travel, employment, and transactions); and, as a result, by inhibiting the productivity of its actual or potential victims and decreasing the supply and demand for interstate products.

This legislative record no doubt supports the wisdom and legitimacy of many of the measures Congress enacted in the Violence Against Women Act, such as the expenditure of federal funds, the criminalization of violence against women with an explicit interstate nexus, and the amendment of the Federal Rules of Evidence to better accommodate the victims of such violence. And, given the sweeping view of Congress' power to regulate interstate commerce suggested by the committee reports and the express statutory-purpose provision, it is not surprising that Congress believed the relationship between gender-motivated crimes of violence and interstate commerce sufficient to support, under the Commerce Clause, the regulation of this noneconomic activity, even in the absence of a jurisdictional element.

However, although appellants repeatedly assert that the relationship described by these findings is direct, *see, e.g.*, Br. of Intervenor United States at 19, 28, 30-31; Reply Br. of Intervenor United States at 10, 12-13, it quite simply is not. Rather, it is almost precisely

analogous to the attenuated, though undoubtedly real, relationship asserted to exist between guns in school zones and interstate commerce, *see Lopez*, 514 U.S. at 563-64, 115 S. Ct. 1624 (rejecting arguments of costs of crime, decreased travel, and decreased national productivity as insufficient to bring the regulation of guns in school zones within the Commerce power), or, for that matter, to that which undoubtedly exists between any significant activity and interstate commerce. That the relationship here is asserted not by appellants alone, but also by Congress, cannot be dispositive. As noted, the Supreme Court did not reject the government's arguments in *Lopez* because they lacked formality. Nor did it reject them because it did not understand them or because it questioned their factual validity. Rather, the Supreme Court held that the Commerce power could not be extended to the regulation of activities having only such an attenuated relationship with interstate commerce without granting Congress an unlimited police power inconsistent with a Constitution of enumerated and limited federal powers. Here, as in *Lopez*, the power that Congress has asserted is essentially limitless; the existence of findings or documentation, standing alone, does not provide the type of meaningful limitation on congressional power required by a Constitution that withholds from Congress "a general police power of the sort retained by the States." *Id.* at 567, 115 S. Ct. 1624.

2.

Appellants also argue that section 13981 is a "civil rights" statute, *see* 42 U.S.C. § 13981(a) (noting purpose of Act "to protect the civil rights of victims of gender motivated violence"), and as such cannot offend the first principles of federalism because civil rights represents

an area of "quintessential federal responsibility." Supp. Br. of Intervenor United States at 6; *see also* Br. of Intervenor United States at 32 (same).

It is unquestionably true that Congress has traditionally assumed an essential role in enacting legislation to protect civil rights and to root out discrimination and its vestiges. However, the Congress has never asserted a general authority, untethered to any specific constitutional power, to enact such legislation. And the Supreme Court has never upheld such legislation solely for the reason that it is civil rights in character. Appellants do not contend otherwise, nor do they really even contend seriously that the Court should do so. Instead, as would be expected under our Constitution of enumerated powers, the Court has upheld such legislation, as all other legislation, only when it has been enacted in exercise of a specific power conferred upon Congress by the Constitution. *Compare Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261-62, 85 S. Ct. 348, 13 L.Ed.2d 258 (1964) (upholding Title II of the Civil Rights Act of 1964 under Commerce Clause of Article I), *and Katzenbach v. McClung*, 379 U.S. 294, 305, 85 S. Ct. 377, 13 L.Ed.2d 290 (1964) (same), *with Lopez*, 514 U.S. at 559-60, 115 S. Ct. 1624 (describing *Heart of Atlanta* and *McClung* as cases upholding regulation governing economic activity and therefore falling comfortably within the contours of the Commerce power); *id.* at 573-74, 115 S. Ct. 1624 (Kennedy, J., concurring) (same). In fact, the Court has not hesitated to invalidate even the most paradigmatic of civil rights initiatives, like the Civil Rights Acts of 1871 and 1875, when there was lacking such support in the Constitution. *See United States v. Harris*, 106 U.S. 629, 1 S. Ct. 601, 27

L.Ed. 290 (1883); *Civil Rights Cases*, 109 U.S. 3, 3 S. Ct. 18, 27 L.Ed. 835 (1883).

Unlike those civil rights laws that have been readily enacted by Congress and readily sustained by the Supreme Court, however, section 13981 is untethered to, and otherwise unsupported by, any such enumerated power. Although appellants attempt to justify section 13981 as a legitimate exercise of Congress' power over interstate commerce, the intrastate, noncommercial violence reached by the section, and its consequences, are far removed from interstate "commercial concerns that are central to the Commerce Clause." *Lopez*, 514 U.S. at 583, 115 S. Ct. 1624 (Kennedy, J., concurring).

Moreover, the conduct targeted by section 13981 bears little resemblance to the discriminatory state denial of equal protection or other conduct that is the concern of the Reconstruction Amendments. *See infra* Part IV. Although assertedly enacted out of concern, in part, for inadequate state law enforcement, the particular shortcomings ascribed by Congress to the States are not so much intentional—and thus unconstitutional—discrimination by the States, but rather the failure, despite "fervent" and "sincere" efforts, S. Rep. No. 102-197,at 39; S. Rep. No. 101-545, at 33, to eradicate the "subtle prejudices" and "stereotypes" that prevent the victims of gender-motivated crimes from obtaining legal vindication in the state courts, S. Rep. No. 102-197, at 39. And the legislation does not even address these shortcomings directly by regulating the States or their officials, but, instead, creates a cause of action against private individuals. The reach of section 13981 is not even limited to private acts of violence committed with the active connivance of the States or their officials, or to private acts of violence purposely aimed at depriving the victims of equal access to legal redress or other constitutional rights. Accordingly, not even appellants seriously contend that the purely private gender-motivated violence reached by section 13981 itself violates the Constitution. *See, e.g.*, Reply Br. of Intervenor United States at 3 ("To be sure, § 1 of the Fourteenth Amendment speaks to state action and does not proscribe purely private conduct."); Br. of Intervenor United States at 21 (similar).

And, not only does section 13981 regulate wholly intrastate and private conduct, but the conduct regulated also falls within the most traditional of state concerns. That is, Congress' motive notwithstanding, the legislation indisputably shifts power from the States to the federal government, blurring the "distinct and discernable lines of political accountability" required by our Constitution. *See Lopez*, 514 U.S. at 576, 115 S. Ct. 1624 (Kennedy, J., concurring).[17]

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[17] Appellants assert that because section 13981 regulates not all violent crime—or even all violent crime against women—but only such crime arising from gender animus, it does not impermissibly intrude upon traditional areas of state authority. To the extent this argument rests on the assumption that gender-motivated crime constitutes a relatively small subset of all violent crime against women, it is in marked tension with appellants' reliance upon congressional findings of the total economic costs of all violence against women to support section 13981. *See supra* Part III.D.1.a. And if appellants believe that gender-motivated violence constitutes a relatively large subset of violence against women, it is difficult to understand how the statutory limitation upon which appellants rely substantially lessens the impact of section 13981 on the balance of state and federal authority.

In reliance upon inapposite precedent, however, appellants maintain that crime motivated by animus uniquely implicates federal interests and falls outside traditional areas of state con-

If we were to hold that a statute like section 13981, which regulates purely private, noneconomic activity at the very core of traditional state concern and has only the most attenuated relation to interstate commerce, could nonetheless be sustained under the Commerce Clause based upon no more than the kind of generalized findings of state shortcomings made here, then Congress could circumvent the constitutional limits on federal power imposed by both the Commerce Clause and the Fourteenth Amendment, *see infra* Part IV, and claim a general police power, because charges that States have failed fully to eradicate or remedy bias can be made about nearly every area of traditional state concern. *See, e.g.*, Leslie Bender & Perette Lawrence,

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cern. Even were this precedent relevant to the scope of congressional authority under the Commerce Clause, the rationale of the cases upon which appellants rely is clearly limited to crime that is itself tied to a specific constitutional violation or is purposefully aimed at depriving its victims of their constitutional rights. *Compare Griffin v. Breckenridge*, 403 U.S. 88, 102, 91 S. Ct. 1790, 29 L.Ed.2d 338 (1971), *with United States v. Guest*, 383 U.S. 745, 784, 86 S. Ct. 1170, 16 L.Ed.2d 239 (1966) (Brennan, J., dissenting), *and Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 275, 113 S. Ct. 753, 122 L.Ed.2d 34 (1993).

In any event, appellants' argument is inconsistent with *Lopez* itself. For, in that case, the Court found that the GFSZA interfered with state authority over violent crime and education, even though it did not regulate all violent crime or all matters relating to education, but only the possession of firearms in school zones. And it did so despite the argument that firearm regulation represented an area in which the federal government has "accumulated institutional expertise." *Lopez*, 514 U.S. at 563, 115 S. Ct. 1624. Clearly, under *Lopez*, a statute regulating only a subset of a traditional area of state concern still implicates the balance of state and federal authority, and it does so even when that subset involves conduct similar to that regulated by the federal government in other contexts.

Is Tort Law Male?: Foreseeability Analysis and Property Managers' Liability for Third Party Rapes of Residents, 69 Chi.-Kent L. Rev. 313 (1993) (tort law); Jane Goodman et al., *Money, Sex, and Death: Gender Bias in Wrongful Death Damage Awards*, 25 Law & Soc'y Rev. 263 (1991) (same); Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 Mich. L. Rev. 814 (1990) (same); Mary Pat Treuthart & Laurie Woods, *Mediation—A Guide for Advocates and Attorneys Representing Battered Women* 13-14, 75 (1990) (contract law); Sylvia A. Law & Patricia Hennessey, *Is the Law Male?: The Case of Family Law*, 69 Chi.-Kent L. Rev. 345 (1993) (family law). In fact, the very findings on which appellants rely in this case would, themselves, justify not only section 13981, but the federalization of all crimes against women, *see, e.g.*, S. Rep. No. 103-138, at 49 (citing studies concluding "that crimes disproportionately affecting women are often treated less seriously than comparable crimes affecting men"). For that matter, they would justify federal regulation, and even occupation, of the entire field of family law, including divorce, alimony, child custody, and the equitable division of property. *See* S. Rep. No. 102-197, at 43 n. 40 (citing studies of state task forces on gender bias that find bias and state failings throughout the entire area of domestic relations and family law); S. Rep. No. 103-138, at 49 n. 52 (similar).

Accordingly, although we respect the concerns underlying appellants' argument that Congress has a general power to pass "civil rights" statutes and acknowledge the argument's intuitive appeal, the Constitution does not extend to Congress the unlimited power that would necessarily follow were we to accept the

argument. To the contrary, the extension of such power to the Congress solely on the grounds that appellants urge would be in contravention both of *Lopez* and of the first principles of federalism on which that opinion rests.

E.

Despite their half-hearted attempts to distinguish *Lopez*, it is apparent that, ultimately, Brzonkala and the government (not to mention the dissent) would have us ignore that decision altogether. Not only do appellants clearly, though mistakenly, regard *Lopez* as at most a decision of little importance, they also make no serious attempt to come to grips with the core reasoning of that opinion. Instead, appellants merely rely on arguments that repeat the opinions of the dissenting Justices in *Lopez* but are squarely foreclosed by the *Lopez* majority, even while criticizing the district court for its efforts to understand and apply the *Lopez* analysis. Unlike Brzonkala and the government, however, we are unwilling to consign the Supreme Court's most significant recent pronouncement on the Commerce Clause to the status of inconvenient but ultimately insignificant aberration.

Throughout their briefs, both Brzonkala and the government repeatedly note that *Lopez* reaffirmed, rather than overturned, the Supreme Court's Commerce Clause decisions of the last sixty years. Apparently on this ground, they also repeatedly assert that *Lopez* did not work any change in the Supreme Court's Commerce Clause jurisprudence, or in the framework for analyzing a statute's constitutionality under the Commerce Clause. *See, e.g.*, Br. of Appellant Brzonkala at 35 ("Rather than creating a new standard, the *Lopez* Court merely declined to expand the Commerce Clause's scope."); Br. of Intervenor United States at 27 (asserting that, in *Lopez*, "the Supreme Court reaffirmed its previous half century of Commerce Clause jurisprudence").

We find such a superficial understanding of *Lopez*, especially by the United States, surprising. Although it is true that the *Lopez* Court did not disturb the precise *holdings* of any previous Supreme Court precedents, it is equally true that the *Lopez* Court renounced or limited some of the most sweeping *reasoning* and *dicta* of its Commerce Clause opinions:

> Admittedly, some of our prior cases have taken long steps down that road [toward converting congressional authority under the Commerce Clause into a police power], giving great deference to congressional power. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further.

Lopez, 514 U.S. at 567, 115 S. Ct. 1624 (citation omitted).[18]

Not only did the Court specifically reject earlier statements suggesting that congressional power extends to the regulation of activities that merely affect

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[18] Although appellants cite this passage as authority for the proposition that *Lopez* reaffirmed the Supreme Court's "previous half century of Commerce Clause jurisprudence," they tellingly do not quote the passage, but instead provide only the following parenthetical description: "recognizing the breadth of the Commerce Clause power under its precedents and simply 'declin[ing] here to proceed any further.'" Br. of Intervenor United States at 27 & n.13. This description, of course, as the textual quotation shows, misrepresents the import of the Supreme Court's pronouncement.

interstate commerce, *id.* at 559, 115 S. Ct. 1624 (admitting that "our case law has not been clear whether an activity must 'affect' or 'substantially affect' interstate commerce" to fall within the Commerce power, and approving, "consistent with the great weight of our case law," the latter analysis as "the proper test"); *cf. id.* at 616, 115 S. Ct. 1624 (Breyer, J., dissenting) ("[T]he word 'substantial' implies a somewhat narrower power than recent precedent suggests."), but it also drew a clear distinction between regulations of economic and noneconomic activities, *see supra* note 5 and accompanying text, limiting to the former category the reach of the authority and reasoning of its most permissive Commerce Clause cases. *Compare id.* at 560, 115 S. Ct. 1624 (majority) ("Even *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not."), *with id.* at 561, 115 S. Ct. 1624 (holding that because GFSZA had "nothing to do with 'commerce' or any sort of economic enterprise," it could not "be sustained under [the Court's] cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce"); *cf. id.* at 627-28, 115 S. Ct. 1624 (Breyer, J., dissenting) (noting the Court's "apparent belief that it can reconcile its holding with earlier cases by making a critical distinction between 'commercial' and non-commercial 'transaction[s]'").

Furthermore, the Court elevated to a majority opinion statements from previous concurring opinions that "[s]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so," *Lopez*, 514 U.S. at 557 n.2, 115 S. Ct. 1624 (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 311, 101 S. Ct. 2352, 69 L.Ed.2d 1 (1981) (Rehnquist, J., concurring in judgment)) (internal quotation marks omitted), and that "[w]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court," *id.* (quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 273, 85 S. Ct. 348, 13 L.Ed.2d 258 (1964) (Black, J., concurring)) (internal quotation marks omitted). Thus, the Court made clear that courts may not merely defer to a legislative judgment that an activity sufficiently affects interstate commerce to satisfy the substantially affects test, but must instead independently evaluate constitutionality under the Commerce Clause, *id.* at 562, 115 S. Ct. 1624, a proposition that had not always been apparent from the earlier cases, *see, e.g., United States v. Lopez*, 2 F.3d 1342, 1362-63 (5th Cir.1993) (suggesting that findings appeared to be dispositive under then existing Supreme Court authority), *aff'd*, 514 U.S. 549, 115 S. Ct. 1624, 131 L.Ed.2d 626 (1995).

Finally, the *Lopez* Court was emphatic that it would not find an activity sufficiently related to interstate commerce to satisfy the substantially affects test in reliance upon arguments that lacked any principled substantive limitations and that consequently would justify plenary federal regulation of anything. *See, e.g., Lopez*, 514 U.S. at 564, 115 S. Ct. 1624 ("paus[ing] to consider the implications of the Government's arguments" and noting that "[u]nder the theories that the

Government presents in support of § 922(q) [the GFSZA], it is difficult to perceive any limitation on federal power"); *id.* at 567, 115 S. Ct. 1624 (refusing "to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States").

Thus, although *Lopez* may have left intact all of the Supreme Court's previous holdings, and even the analytical framework for determining the constitutionality of regulations of *economic* activity, *see, e.g., id.* at 573-74, 115 S. Ct. 1624 (Kennedy, J., concurring) (noting that "*[s]tare decisis* operates with great force in counseling us not to call in question the essential principles now in place respecting the congressional power to regulate transactions of a *commercial* nature" and that precedents upholding regulations of "*commercial* transactions" were "within the fair ambit of the Court's practical conception of *commercial* regulation and are not called in question by our decision today" (emphases added)), appellants' suggestion that *Lopez* changed nothing at all is in serious error.

In accordance with their misunderstanding of *Lopez* as an aberrational decision that worked little change in the Supreme Court's Commerce Clause jurisprudence, appellants hardly even cite the opinion at all, let alone those portions of the opinion that set forth the Court's holding and essential reasoning.

Although *Lopez* is emphatically clear that the Gun-Free School Zones Act's principal defects were its failure either to regulate an economic activity or to include a jurisdictional element—so clear, it bears repeating, that the Court both began and ended its opinion, as well as framed its holding, by reference to these defects, *see,*

e.g., id. at 551, 115 S. Ct. 1624; *id.* at 557, 115 S. Ct. 1624—appellants neither discuss nor even cite these aspects of the opinion. Instead, appellants completely ignore the crucial distinctions drawn by the Supreme Court between regulations of economic and non-economic activities, and between regulations that include a jurisdictional element and those that do not, and even chastise the district court for considering section 13981's failure to regulate an economic activity or to include a jurisdictional element.[19] *See, e.g.*, Br. of Appellant Brzonkala at 34 (criticizing the district court for "ignor[ing] the last half-century of Commerce Clause cases prohibiting public and private discrimination that in the aggregate substantially affects interstate commerce," but citing only to cases upholding regulations of *economic* activities); *id.* at 38 n.32 (similar); *id.* at 39 n.34 (asserting that "*Lopez* does not . . . preclude federal criminal statutes when state law enforcement has proven inadequate," but citing only to a lower court decision upholding a statute that contained a jurisdictional element); *id.* at 36 ("Without any basis, the court below interpreted *Lopez* as limiting valid Commerce Clause legislation to laws that (1) have a jurisdictional element linking the activity to interstate commerce, or (2) regulate economic activity.

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[19] Almost by way of afterthought, the government, in the final paragraph of its principal brief, and without citation, concedes that the fact "[t]hat a statute does not address economic activity directly may, as in *Lopez*, suggest that the connection between federal legislation and interstate commerce is impermissibly attenuated." Br. of Intervenor United States at 33-34. Among the six briefs filed by Brzonkala and the United States before this court, this lone sentence constitutes the sum total of the appellants' attention to the critical distinction *Lopez* draws between regulations of economic and noneconomic activities.

Nothing in *Lopez* imposes those prerequisites." (citation and footnote omitted)); Reply Br. of Intervenor United States at 10 (similar); Supp. Br. of Appellant Brzonkala at 4 (similar). *Compare* Supp. Br. of Intervenor United States at 4 ("[T]he Supreme Court's concern with federalism did not lead it to overrule any precedent or to confine Congress's authority under the Commerce Clause to the regulation of economic activity."), *and* Br. of Intervenor United States at 18-19 (similar), *with id.* at 33-34 (criticizing the district court for placing "considerable emphasis" on section 13981's failure to regulate economic activity).[20]

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[20] At times, in fact, appellants come dangerously close to affirmatively misrepresenting the holding and analysis of *Lopez*. *Compare* Br. of Intervenor United States at 34 ("The Court in *Lopez* did not, however, hold that Congress was limited to the direct regulation of economic activity under the Commerce Clause. Instead, the Court reiterated that '"[e]ven if [an] activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce. . . ."' *Lopez*, 115 S. Ct. at 1628 (quoting *Wickard v. Filburn*, 317 U.S. at 125, 63 S. Ct. 82)." (alterations and omissions in Br.)); *id.* at 27-28 (similar); *and* Br. of Appellant Brzonkala at 36 n.2 ("In *Wickard v. Filburn*, which *Lopez* did not purport to reverse, the Court held that even if an activity is not commercial, it may be reached by Commerce Clause if it *exerts* a 'substantial economic *effect*.' 317 U.S. 111, 125, 63 S. Ct. 82, 87 L.Ed. 122 (1942) (emphasis added)."), *with Lopez*, 514 U.S. at 560-61, 115 S. Ct. 1624 (characterizing *Wickard* as a case involving economic activity and holding that because the GFSZA "had nothing to do with 'commerce' or any sort of economic enterprise," it could not be sustained under the authority or reasoning of cases such as *Wickard* that had upheld regulations of economic activities); *id.* at 559-60, 115 S. Ct. 1624 (listing *Wickard* among "examples" of cases upholding regulations of economic activities); *and supra* Part III.B.1. *Compare also* Br. of Intervenor United States at 27 & n.2 (stating that *Lopez* merely reaffirmed the "previous half century of Commerce Clause jurisprudence"; citing for this proposition *Lopez*, 115 S. Ct. at 1637 (Kennedy, J., concurring), and characterizing this passage with the following parenthetical description: "Commerce Clause precedents 'are not called into question by our decision today'"), *with Lopez*, 514 U.S. at 573-74, 115 S. Ct. at 1637 (Kennedy, J., concurring) ("Later examples of the exercise of federal power where *commercial* transactions were the subject of the regulation include *Heart of Atlanta Motel, Inc. v. United States*, *Katzenbach v. McClung*, and *Perez v. United States*. These and like authorities are within the fair ambit of the Court's practical conception of *commercial* regulation and are not called in question by our decision today." (citations omitted; emphases added)); *cf. supra* Part III.A & nn.5, 18, 19.

It is evident that appellants' refusal to acknowledge the clear distinctions drawn by the *Lopez* Court between laws that regulate economic activities or include jurisdictional elements and those that do not cannot be squared with the majority or concurring opinions in *Lopez*. And, indeed, their attempts to paper over these distinctions and persuade us to sustain section 13981 on the authority of *Wickard* and similar cases are but echoes of the arguments that failed to persuade a majority of the Court in *Lopez*. *See, e.g.*, *Lopez*, 514 U.S. at 608-09, 115 S. Ct. 1624 (Souter, J., dissenting) (recognizing but criticizing the importance placed by the Court on both distinctions); *id.* at 616, 115 S. Ct. 1624 (Breyer, J., dissenting) (arguing that *Wickard*-style reasoning applies to the evaluation of all congressional regulations); *id.* at 627-30, 115 S. Ct. 1624 (recognizing, but criticizing, Court's distinction between regulation of economic and noneconomic activities).

Similarly, despite the *Lopez* Court's clarification of the judicial role in independently evaluating constitu-

tionality under the Commerce Clause, *see Lopez*, 514 U.S. at 557 n. 2, 115 S. Ct. 1624; *id.* at 562-63, 115 S. Ct. 1624, appellants also ignore the clear import of these passages, seizing instead upon references by the Court to "rational basis" review, *see id.* at 557, 115 S. Ct. 1624 (describing the Court's post-New Deal Commerce Clause analysis); *id.* at 564, 115 S. Ct. 1624(describing the government's argument), in a transparent attempt to relegate the decision to insignificance.[21] Although *Lopez* undoubtedly preserves a healthy degree of judicial deference to reasonable legislative judgments of fact, it is plain that appellants do not by their incessant invocations of "rational basis review" contemplate merely such deference. Rather, it is evident that they use this fashionable label of judicial restraint to disguise their advocacy of a deference so absolute as to preclude any independent judicial evaluation of constitutionality whatsoever—a deference indistinguishable from judicial abdication. And the dissent does likewise; indeed, laying bare appellants' and the dissent's standard of review to an extent that will surely prove disquieting to appellants, the dissent, after announcing the "rational basis" standard of review, offers not a single sentence—*not one*—of independent analysis of whether gender-motivated violence substantially affects interstate commerce.

[21] *See, e.g.*, Br. of Appellant Brzonkala at 35 n.29 (asserting, without analysis, that "[t]he *Lopez* decision's recognition that a law's constitutionality ultimately is a judicial decision does not disturb the deferential rational basis review the Court endorsed"); *id.* at 35 ("*Lopez* leaves undisturbed the well-established principle that Commerce Clause legislation will be upheld as long as Congress had a *rational basis* for concluding that the regulated activity sufficiently affected interstate commerce."); *id.* ("*Lopez* does not disturb the standard Commerce Clause rational basis review."); Br. of Intervenor United States at 19 ("[T]he rational basis standard [was] reaffirmed in *Lopez*."); Supp. Br. of Intervenor United States at 1 (same); *cf.* Br. of Intervenor United States at 28 (referring to "rational basis" review); Reply Br. of Appellant Brzonkala at 14 (same); Reply Br. of Intervenor United States at 13 (same); Supp. Br. of Appellant Brzonkala at 1-2 (same); Supp. Br. of Intervenor United States at 4, 6 (same); *id.* at 2 (similar).

Such a view of the judicial role obviously cannot be reconciled with the opinions of the Court and of the concurring Justices in *Lopez*. And it is clear from the paucity of attention given by appellants and the dissent to these opinions that they do not derive their understanding of the judicial role in evaluating constitutionality under the Commerce Clause from these sources, but rather, again, from the *Lopez* dissents, the core rhetoric and reasoning of which their arguments closely parallel. *Compare* Br. of Appellant Brzonkala at 37 ("Rather than apply the traditional Commerce Clause analysis ratified by *Lopez*, the District Court instead substituted its own analysis and judgment."); *id.* (criticizing district court for "abandon[ing]" the "rational basis test"); Br. of Intervenor United States at 31 (similar); Reply Br. of Intervenor United States at 12 ("The VAWA may be invalidated only if the Court chooses to set aside the findings of a direct connection between gender-motivated violence and interstate commerce. . . . [T]his task requires broad scale second-guessing of legislative findings and judgment."); *and* Br. of Intervenor United States at 31 (similar), *with Lopez*, 514 U.S. at 603, 115 S. Ct. 1624 (Souter, J., dissenting) (invoking rational basis review); *id.* at 604, 115 S. Ct. 1624 ("The practice of deferring to rationally based legislative judgments is a paradigm of judicial restraint." (internal quotation marks and citation omitted)); *id.* at 604-07, 115 S. Ct. 1624 (discussing the genesis of rational basis review);

id. at 608, 115 S. Ct. 1624 (decrying the majority's "qualification of rational basis review"); *id.* at 609, 115 S. Ct. 1624 (stating that the implications of the Court's opinion could not "square with rational basis scrutiny"); *id.* at 614-15, 115 S. Ct. 1624 ("Because Justice Breyer's opinion demonstrates beyond any doubt that the Act in question passes the rationality review that the Court continues to espouse, today's decision may be seen as only a misstep. . . ."); *id.* at 616-17, 115 S. Ct. 1624 (Breyer, J., dissenting) (invoking rational basis review); *id.* at 618-25, 115 S. Ct. 1624 (purportedly applying rational basis review); *and id.* at 631, 115 S. Ct. 1624 ("Upholding this legislation would do no more than simply recognize that Congress had a 'rational basis' for finding a significant connection between guns in or near schools and (through their effect on education) the interstate and foreign commerce they threaten.").

Whether one agrees or disagrees with our conclusion, it is the majority, not the dissent, that has undertaken the "rational basis" review contemplated by the Court in *Lopez*. That is, having been presented with Congress' findings on the matter, we have "independent[ly] evaluat[ed]" "whether a rational basis exist[s] for concluding that a regulated activity [here, gender-motivated violence] sufficiently affect[s] interstate commerce," to justify the exercise of Congress' broad powers under Article I, section 8. And we have done this mindful of the Supreme Court's pointed admonitions that "[s]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so" and that "[w]hether particular operations affect interstate commerce sufficiently . . . is ultimately a judicial rather than a legislative question." *Lopez*, 514 U.S. at 557 & n.

2, 562, 115 S. Ct. 1624 (internal quotation omitted). In this undertaking emphatically required by the Supreme Court in *Lopez*, appellants would have us only half-heartedly engage and the dissent would have us engage not at all.

Finally, not content simply to emasculate the judicial role in the determination of whether Congress has exceeded its constitutional authority, appellants also would disregard the first principles of federalism that collectively constitute the infrastructure of the majority opinion in *Lopez*, only grudgingly acknowledging even their existence. *See* Reply Br. of Intervenor United States at 14; Supp. Br. of Intervenor United States at 4. Specifically, like the dissent, which at the same time that it roundly criticizes us for attempting a principled line between that which is "truly national" and that which is "truly local," *Lopez*, 514 U.S. at 567-68, 115 S. Ct. 1624, tellingly omits quotation of all of the passages from *Lopez* reflecting the Court's commitment to such a limitation on the Commerce power,[22] appellants never

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[22] *See, e.g., Lopez*, 514 U.S. at 557, 115 S. Ct. 1624 ("In *Jones & Laughlin Steel*, the Court warned that the scope of the interstate commerce power 'must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.'"); *id.* at 564, 115 S. Ct. 1624 ("Under the theories that the Government presents in support of § 922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign."); *id.* ("Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate."); *id.* at 567, 115 S. Ct. 1624 ("To uphold the Government's contentions here, we would have to pile

address either the *Lopez* Court's concern with the *implications* of the government's arguments or its refusal to rely upon arguments that lack any principled limitations and would justify federal regulation of any activity. Instead, they simply note a series of particular characteristics of section 13981 that they believe minimize the statute's disruption of the balance between state and federal authority, such as its partial reliance on state law in defining the conduct that it regulates; its exclusion of supplemental jurisdiction over divorce, custody proceedings, and similar matters; and its relatively narrow focus on gender animus.

Not only do these statute-specific characteristics not eliminate the impact of section 13981 on the balance of federal and state authority, *see supra* at 840-42, 852-53 & nn. 10, 16, the logic of the argument that appellants advance for sustaining the statute is independent of these characteristics; that is, the argument would require us to sustain section 13981 even without the particular characteristics upon which the government relies to distinguish the provision. For the essence of appellants' contention is that Congress can regulate any problem solely by finding that it affects the economy and has not been fully remedied by the States. *See, e.g.*, Br. of Intervenor United States at 32; *but cf.* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320904, 108 Stat. 1796, 2125 (adding to GFSZA, *inter alia*, statutory finding that the States are unable to curb gun-related violence). But if Congress has found that the States have failed adequately to ad-

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inference upon inference *in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.*" (emphasis added)).

dress violence against women, and that such violence affects the economy, then surely it need not rely on state law definitions of violent crime, but can itself define such crime, preempting the States' criminal and tort laws altogether. And if Congress has found that the States have failed to eradicate gender bias, a problem that is not limited to violent crime but permeates the law generally, and family law in particular, then Congress need not proscribe federal jurisdiction over the core areas of family law, but can extend supplemental jurisdiction over these areas, or even regulate them directly and perhaps exclusively, because issues of divorce, alimony, the equitable division of property, and child custody, like violent crime, indisputably have ultimate economic effects. Furthermore, if the congressional findings in this case as to the shortcomings of the States and the effects of violence against women would support the regulation of gender-motivated violence against women, then they would also support the regulation of all violence against women. Indeed, the States' failure to eliminate gender-motivated violent crime can surely be cited as a specific example of failure to resolve fully not only problems of animus, but also the scourge of violent crime generally. And it cannot be doubted that if gender-motivated violent crime affects the economy, *a fortiori* all violent crime affects the economy. Accordingly, there is no reason that Congress must, under the logic of appellants' arguments, limit its reach to violent crime motivated by gender animus, rather than assume control over the entire field of violent crime, or, for that matter, all crime within all of the States.

The dissent stands in what we suspect will be, for appellants, uncomfortable testament to this infinite

reach of appellants' argument. In the single paragraph of over arching significance in the dissent, our colleagues do nothing more than recite the following statement from the conference committee and assert, in *ipse dixit* protestingly characterized as "independent evaluation," that gender-motivated violence really does substantially affect interstate commerce:

> [C]rimes of violence motivated by gender have a substantial adverse effect on interstate commerce, by deterring potential victims from traveling interstate, from engaging in employment in interstate commerce, and from transacting with business, and in places involved, in interstate commerce . . . by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products. . . . [M]y independent evaluation of Congress's "legislative judgment" compels me to conclude that Congress had a rational basis for finding that gender-based violence substantially affects interstate commerce.

Infra at 913, 916 (quoting H.R. Conf. Rep. No. 103-711, at 385, 1994 U.S.C.C.A.N. at 1853; citation and footnote omitted); *see also* id. at 916- 17 n. 5.

But with only a moment's reflection it is apparent—as the dissent certainly recognizes—that what is said by the dissent (and Congress) to be true of gender-motivated violence is true of *all* crime many times over, as the simple deletion of the phrases "motivated by gender" and "gender-based" from this passage confirms:

> [C]rimes of violence have a substantial adverse effect on interstate commerce, by deterring potential victims from traveling interstate, from engaging in employment in interstate commerce, and from transacting with business, and in places involved, in interstate commerce . . . by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products. . . . [M]y independent evaluation of Congress's "legislative judgment" compels me to conclude that Congress had a rational basis for finding that violence substantially affects interstate commerce.

Cf. Lopez, 514 U.S. at 564, 115 S. Ct. 1624 (rejecting argument from "costs of crime" and "national productivity" as leading to congressional power to "regulate not only all violent crime, but all activities that might lead to violent crime" and as eliminating "any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign").[23] The implications of such

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[23] Indeed, the substitution of "violent crime" or "crime" for "gender-based violence" in even the individualized statements regarding section 13981 relied upon by the dissent and the government, none of which was by Congress as an institution and few of which were even made by congressional members or staff, confirms the boundless power that would reside in the Congress were the section to be sustained upon such statements:

> *Violent crime* and the fear of *violent crimes* restricts movement, reduces employment opportunities, increases health expenditures, and reduces consumer spending, all of which affect interstate commerce and the national economy.

Infra at 912-13.

> [E]stimates suggest that we spend [billions] a year on health care, criminal justice, and other social costs of *violence* . . . [and lose billions] annually due to absenteeism in the workplace.

Id. at 913-14.

reasoning for the sovereign States need hardly be particularized.

To these sweeping implications of their arguments, appellants offer little response other than that Congress here has enacted a more limited statute. Such a meager response is palpably insufficient, although we acknowledge that it may well be the one even remotely plausible argument available in the wake of *Lopez*.

The only other argument, which appellants advisedly forgo, is that of our colleagues in dissent, who would, in

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> *Violent crime* bars its [targets] from full participation in the national economy.

Id. at 913.

> Even the fear of *violent crime* affects the economy because it deters [men and] women from taking jobs in certain areas or at certain hours that pose a significant risk of such violence.

Br. of Intervenor United States at 7.

> [Men and] women often refuse higher paying night jobs in service/retail industries because of the fear of attack.

Infra at 914.

> Fear of *crime* even deters [men and] women from using public transportation and thus acts as a barrier to mobility, particularly for those . . . who have no alternative to public transportation because of economic constraints.

Br. of Intervenor United States at 8 (internal quotation omitted).

> The threat of violence has made many [men and] women understandably afraid to walk our streets or use public transportation.

Id.

> But the costs do not end there: *violent crime* has a devastating social and economic effect on the family and the community.

Infra at 914 (internal quotation omitted).

blissful denial of the Court's most recent precedents on Our Federalism, proceed to import into Commerce Clause analysis a doctrine whose legitimacy even in the context in which it was fashioned was in doubt from inception, *see Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 105 S. Ct. 1005, 83 L.Ed.2d 1016 (1985), and hold that Congress alone is constitutionally responsible for the protection of the sovereign States. Thus says the dissent in a passage that is so startling in its quaint innocence that it bears repetition in full:

> My colleagues in the majority iterate and reiterate that the enumeration of powers in the Constitution reserves authority to the states, that ours is a system of dual sovereignty, and that the states must operate as independent governmental bodies for that system to continue to exist. No one doubts the validity of any of these principles. The critical question, however, is who decides how they are to be upheld. The Constitution itself provides a clear and specific answer to that question. It allocates the fundamental power of government— the power of legislation—to Congress. Congress is not some central dictatorial assembly with interests independent of and antithetical to the states. Rather, Congress is composed entirely of members elected from each state to represent the interests of the people of that state, and is specifically designed to preserve state authority and protect state interests. Congressional legislation accordingly is not, as the majority suggests, a command from an autonomous central power to totally subjugated states. Congressional legislation is instead the product of the constitutionally coordinated authorities of the states, the localities, and the people. Courts

> thus have slender authority to invalidate the result of Congress's legislative process in order to protect the states or localities, unless there is some reason to suspect that the legislative process has been or will be unreliable.

Infra at 932-33.

As the Chief Justice (then-Justice Rehnquist) and Justice O'Connor might have said in their impassioned dissents predicting that the "Court will in time" overrule *Garcia* and "again assume its constitutional responsibility," *Garcia*, 469 U.S. at 580, 589, 105 S. Ct. 1005 (O'Connor, J.,dissenting, joined by Powell and Rehnquist, JJ.); *see also id.* at 580, 105 S. Ct. 1005 (Rehnquist, J., dissenting), such is nothing short of putting the fox in charge of the chicken coop. For, as Justice O'Connor wrote in critique of the *Garcia* majority, under Justice Blackmun's formulation, "all that stands between the remaining essentials of state sovereignty and Congress is the latter's underdeveloped capacity for self-restraint." And,

> [i]f federalism so conceived and so carefully cultivated by the Framers of our Constitution is to remain meaningful, [the courts] cannot [so] abdicate [their] constitutional responsibility to oversee the Federal Government's compliance with its duty to respect the legitimate interests of the States.

Id. at 589, 105 S. Ct. 1005 (O'Connor, J., dissenting).

One need not rely upon the prescience of the Chief Justice and Justice O'Connor, however, for the conclusion that the dissent's view of federalism bears no resemblance to the Supreme Court's. He need only look to the Court's decision in *Lopez* itself where, in virtual anticipation of the very argument made by the

dissent, Justice Kennedy wrote for himself, for Justice O'Connor, and just as assuredly for the three remaining Justices of the majority, that

> the absence of structural mechanisms to require [Congress] to undertake this principled task [of ensuring the proper federal balance], and the momentary political convenience often attendant upon their failure to do so, argue against a complete renunciation of the judicial role. Although it is the obligation of all officers of the Government to respect the constitutional design, the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far.

Lopez, 514 U.S. at 578, 115 S. Ct. 1624 (Kennedy, J., concurring, joined by O'Connor, J.).

Thus does the dissent, even more than do appellants, fundamentally misapprehend the Court's recent pronouncements on our dual sovereignty and the affirmative constitutional obligation of the judiciary to safeguard the sovereignty of the States against congressional encroachment. As *Lopez* forcefully reminds us, our federal system of government exists not as a mere matter of legislative grace, as the dissent (and ultimately appellants) would have, but rather as a matter of constitutional design.

IV.

Although in the wake of *City of Boerne* appellants have returned to defend section 13981 primarily as a constitutional exercise of Congress' power under the Commerce Clause, they still contend alternatively,

though now less enthusiastically, that section 13981 is a constitutionally legitimate exercise of Congress' power under Section 5, one of the explicit bases upon which section 13981 was enacted. *See* 42 U.S.C. § 13981(a) (describing statute as adopted "[p]ursuant to the affirmative power of Congress to enact this part . . . under section 5 of the Fourteenth Amendment . . .").

The Fourteenth Amendment, of course, provides in pertinent part as follows:

> Section 1. No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. Const. amend. XIV, §§ 1, 5. Appellants maintain that Congress properly invoked Section 5 in enacting section 13981 because Congress concluded that bias and discrimination against women in the state criminal justice systems "often deprive[] victims of crimes of violence motivated by gender of equal protection of the laws and the redress to which they are entitled" and that section 13981 was "necessary to guarantee equal protection of the laws." H.R. Conf. Rep. No. 103-711, at 385, *reprinted in* 1994 U.S. Code Cong. & Admin. News 1839, 1853. The remaining issue for us, therefore, is whether section 13981 is "appropriate legislation" to "enforce" the substantive constitutional guarantee that "[n]o State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, §§ 1, 5. In light of Supreme Court precedent, and particularly given the Court's recent decision in *City of Boerne*, we hold that it is not.

A.

Section 13981 creates a cause of action against private parties who commit acts of gender-motivated violence, and that action may be pursued without regard to whether the State connived in those acts or otherwise violated the particular plaintiff's constitutional rights. To sustain section 13981 under Section 5 of the Fourteenth Amendment, therefore, we would have to hold that Section 5 permits Congress to regulate purely private conduct, without any individualized showing of unconstitutional state action. Because, under the Amendment's text, its history, and a consistent line of Supreme Court precedent dating from just after the Amendment's ratification to the present, it is established that Congress may not regulate purely private conduct pursuant to its Fourteenth Amendment enforcement power, we cannot so hold.

1.

Section 1 of the Fourteenth Amendment, which defines the rights "enforceable" by Congress through "appropriate legislation," provides that "[n]o *State* shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1 (emphasis added). The Supreme Court observed in *United States v. Guest*, 383 U.S. 745, 86 S. Ct. 1170, 16 L.Ed.2d 239 (1966), that this prohibition is directed *exclusively* to the States:

> The Equal Protection Clause does not add anything to the rights which one citizen has under the Constitution against another. . . . This has been the view of the Court from the beginning [and] [i]t remains the Court's view today.

Id. at 755, 86 S. Ct. 1170 (internal quotation marks and citations omitted). In the thirty years since *Guest*, not only the Court as a whole but nearly every Member of the Court individually has expressly embraced this longstanding view as to the state action limitation of the Amendment. In *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 102 S. Ct. 2744, 73 L.Ed.2d 482 (1982), the Court, characterizing its prior precedents as "insist[ing] that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State," *id.* at 937, 102 S. Ct. 2744, wrote simply, but unequivocally, that "[b]ecause the [Fourteenth] Amendment is directed at the States, it can be violated only by conduct that may be fairly characterized as 'state action,'" *id.* at 924, 102 S. Ct. 2744. A year later, in *Blum v. Yaretsky*, 457 U.S. 991, 102 S. Ct. 2777, 73 L.Ed.2d 534 (1982), the Court again forcefully stated the state action requirement: "[T]he principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States." *Id.* at 1002, 102 S. Ct. 2777 (internal quotation marks and citation omitted). And in *Georgia v. McCollum*, 505 U.S. 42, 112 S. Ct. 2348, 120 L.Ed.2d 33 (1992), the Court observed that "[r]acial discrimination, although repugnant in all contexts, violates the Constitution *only* when it is attributable to state action." *Id.* at 50, 112 S. Ct. 2348 (emphasis added). As the Court explained at some length in *NCAA v. Tarkanian*, 488 U.S. 179, 109 S. Ct. 454, 102 L.Ed.2d 469 (1988),

> Embedded in our Fourteenth Amendment jurisprudence is a dichotomy between state action, which is subject to scrutiny under the Amendment's Due Process Clause, and private conduct, against which the Amendment affords no shield, no matter how unfair that conduct may be. As a general matter the protections of the Fourteenth Amendment do not extend to private conduct abridging individual rights. Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law . . .

Id. at 191, 109 S. Ct. 454 (internal quotation marks and citations omitted).

Even when they have not joined the Court's opinions in particular cases or have written separately, the individual Members of the Court have not hesitated to express their agreement that the Fourteenth Amendment confers rights only against the States. *See Morse v. Republican Party*, 517 U.S. 186, 248, 116 S. Ct. 1186, 134 L.Ed.2d 347 (1996) (Kennedy, J., dissenting)("[W]e have been cautious to preserve the line separating state action from private behavior that is beyond the Constitution's reach."); *J.E.B. v. Alabama*, 511 U.S. 127, 150, 114 S. Ct. 1419, 128 L.Ed.2d 89 (1994) (O'Connor, J., concurring) ("The Equal Protection Clause prohibits only discrimination by state actors."); *McCollum*, 505 U.S. at 59, 112 S. Ct. 2348 (Rehnquist, C.J., concurring); *id.* (Thomas, J., concurring in the judgment); *id.* at 63, 112 S. Ct. 2348 (O'Connor, J., dissenting) (noting that distinction between private and state action "appears on the face of the Fourteenth Amendment"); *id.* at 69, 112 S. Ct. 2348 (Scalia, J., dissenting); *Lugar*, 457 U.S. at 945, 102 S. Ct. 2744 (Powell, J., dissenting, joined by Rehnquist and O'Connor, JJ.) ("[The Fourteenth Amendment] does not create rights enforceable against private citizens . . . but only against the States.").

Indeed, even Justices Brennan and Marshall, who typically advocated the most expansive interpretations of the Fourteenth Amendment, agreed that the Amendment extends only to state action. Justice Brennan, for example, dissenting in *Blum*, described the Fourteenth Amendment as "a restraint on the abuse of state power." *Blum*, 457 U.S. at 1012, 102 S. Ct. 2777 (Brennan, J., dissenting). And Justice Marshall fully concurred in that view of the reach of the Amendment. *See Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 185, 92 S. Ct. 1965, 32 L.Ed.2d 627 (1972) (Brennan, J., dissenting, joined by Marshall, J.); *cf. Tarkanian*, 488 U.S. at 199, 109 S. Ct. 454 (White, J., dissenting, joined by Brennan, Marshall, and O'Connor, JJ.) (stating issue as "whether the NCAA . . . became a state actor").

Unsurprisingly, in accord with its uniform understanding of Section 1 as conferring rights only against the States, the Court has consistently held that Congress' Section 5 power to enforce Section 1 is correspondingly limited to remedial action against States and state actors. Thus, and significantly for the disposition of the question before us, as recently as 1997 in *City of Boerne*, the Court explained that Section 5 grants Congress only a "remedial" power to "make . . . effective" Section 1's "substantive prohibitions against the States." 117 S. Ct. at 2165. Such "remedial" legislation, the Court emphasized, "should be adapted to the mischief and wrong which the [Fourteenth] [A]mendment was intended to provide against"—unconstitutional action by the States. *Id.* at 2170 (internal quotation marks and citation omitted); *see also id.* at 2166 (that "Congress' § 5 power [is] corrective or preventive, not definitional, has not been questioned");

cf. Morse, 517 U.S. at 276, 116 S. Ct. 1186 (Thomas, J., dissenting, joined by Rehnquist, C.J., and Scalia, J.) ("[I]t is well-established that Congress may not regulate purely private behavior pursuant to its enforcement power under the Fourteenth . . . Amendment[]."); *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 605-06, 110 S. Ct. 2997, 111 L.Ed.2d 445 (1990) (O'Connor, J. dissenting, joined by Rehnquist, C.J., and Scalia and Kennedy, JJ.) ("Section 5 empowers Congress to act respecting the States" and "provides to Congress a particular, structural role in the oversight of certain of the States' actions.").

These many and recent expressions by the Court of the reach of Sections 1 and 5 of the Fourteenth Amendment rest firmly not only on the Amendment's plain language, but also on the legislative history and early jurisprudence of the Amendment. In *City of Boerne*, the Court recounted the historical justification for its interpretation of the Amendment as limited to state action and Congress' power thereunder as limited to the enactment of legislation aimed at the States. In particular, the Court contrasted the language and original understanding of the Amendment, as adopted, with the language and understanding of an earlier, rejected draft of the Amendment. *See generally City of Boerne*, 117 S. Ct. at 2164-66. This earlier draft, the so-called Bingham Amendment, was reported early in 1866 by Republican Representative John Bingham of Ohio to the House of Representatives on behalf of the Joint Committee on Reconstruction:

> The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all

> persons in the several States equal protection in the rights of life, liberty, and property.

Cong. Globe, 39th Cong., 1st Sess. 1034 (1866), *quoted in City of Boerne*, 117 S. Ct. at 2164. By its terms, this draft Amendment would have authorized Congress to secure equality in the rights of life, liberty, and property of all citizens, by legislating *directly* upon these rights. Consequently, that proposed broad grant of congressional power quickly generated enormous opposition from members of the Reconstruction Congress who feared that a congressional power to legislate in such a manner would reduce the role of the States to a virtual nullity. *See, e.g., City of Boerne*, 117 S. Ct. at 2164 (Bingham Amendment would permit "Congress to legislate fully upon all subjects affecting life, liberty, and property, such that there would not be much left for the State Legislatures.") (quoting Sen. Stewart); *id.* ("Members of Congress from across the political spectrum criticized the Amendment, and the criticisms had a common theme: The proposed Amendment gave Congress too much legislative power at the expense of the existing constitutional structure."); *id.* ("Democrats and conservative Republicans argued that the proposed Amendment would give Congress a power to intrude into traditional areas of State responsibility, a power inconsistent with the federal design central to the Constitution.").

In the face of these objections, the Bingham Amendment was tabled, and the Joint Committee on Reconstruction thereafter drafted the proposal that eventually became the Fourteenth Amendment. This draft, like the Fourteenth Amendment itself, "imposed several self-executing limits on the States," 117 S. Ct. at 2165, and also authorized Congress "to enforce, by

appropriate legislation, the provisions of this article," Cong. Globe, 39th Cong., 1st Sess. 2286, *quoted in City of Boerne*, 117 S. Ct. at 2165. Subsequently adopted and ratified (with modifications not relevant here), this Amendment was understood by the Reconstruction Congress only to grant Congress "the power to make the substantive constitutional prohibitions *against the States* effective." *City of Boerne*, 117 S. Ct. at 2165 (emphasis added); *see also id.* (Section 5 "enables Congress, in case the States shall enact laws in conflict with the principles of the amendment, to correct that legislation by a formal congressional enactment") (quoting Sen. Howard); *id.* (new draft would "allow[] Congress to correct the unjust *legislation of the States*" (emphasis added)) (quoting Rep. Stevens); *id.* (new draft would vest Congress with authority "to protect by national law the privileges and immunities of all the citizens of the Republic . . . whenever the same shall be abridged or denied by the unconstitutional acts of any *State*" (emphasis added)) (quoting Rep. Bingham).

Accordingly, this proposed Amendment did not raise the concerns that had ignited the debate over the Bingham Amendment, namely, that authorizing Congress to legislate directly upon individual rights would unduly expand Congress' powers at the expense of the States and authorize Congress "to prescribe uniform national laws with respect to life, liberty, and property." *Id.* As the Supreme Court emphasized in *City of Boerne*, this legislative history—that Congress explicitly considered an earlier draft Amendment that would have given Congress power to regulate purely private conduct, rejected that draft in the face of sharp opposition, and subsequently adopted an Amendment that gave Congress only the power to "enforce" a "provi-

sion" that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws"—has a "*direct bearing* on the central issue of defining Congress' enforcement power." *Id.* at 2164 (emphasis added). In our view, and as the Supreme Court has consistently held, this history confirms the plain-language and common-sense understanding that Section 1 provides rights only against the States and that, correspondingly, Section 5 only grants Congress power to enforce the rights provided in Section 1 through legislation directed against state action, not a power to regulate purely private conduct.

This understanding is reinforced by two Supreme Court decisions rendered nearly contemporaneously with the Amendment's ratification—*United States v. Harris*, 106 U.S. 629, 1 S. Ct. 601, 27 L.Ed. 290 (1883), and the *Civil Rights Cases*, 109 U.S. 3, 3 S. Ct. 18, 27 L.Ed. 835 (1883). Although the particular prohibitions voided in these cases have since been properly sustained under different constitutional provisions, the broader holdings of these cases limiting the Fourteenth Amendment and its enforcement power to state action remain unassailable. *See infra* Part IV.B; *see also City of Boerne*, 117 S. Ct. at 2166, 2170 (quoting the *Civil Rights Cases* and citing with approval both *Harris* and the *Civil Rights Cases*).

In *Harris*, the Court invalidated section two of the Civil Rights Act of 1871, which forbade any person to "conspire . . . for the purpose of depriving . . . any person . . . of the equal protection of the laws." 106 U.S. at 632, 1 S. Ct. 601. The Court began its constitutional inquiry by emphasizing "that the government of the United States is one of delegated, limited, and enumerated powers," *id.* at 635, 1 S. Ct. 601, that " 'the

powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively[,] or to the people,'" *id.* at 636, 1 S. Ct. 601 (quoting U.S. Const. amend. X), and, therefore, that section two of the Act could stand only if it were a valid exercise of one of Congress' enumerated powers.

The Court then went on to hold that section two of the Act, which punished private individuals for interfering with other private individuals' rights, exceeded Congress' power under Section 5. In reaching this conclusion, the Court first canvassed the language and meaning of the Fourteenth Amendment and concluded *both* that Section 1 of that Amendment imposes an obligation only upon the States *and* that Section 5 of the same authorizes Congress to enforce the guarantees of Section 1 *only against the States themselves*:

> [The Fourteenth Amendment] is a guaranty of protection against the acts of the State government itself. It is . . . not a guaranty against the commission of individual offenses; and *the power of Congress . . . to legislate for the enforcement of such a guaranty, does not extend to the passage of laws for the suppression of crime within the States. The enforcement of the guaranty does not require or authorize congress to perform "the duty that the guaranty itself supposes it to be the duty of the State to perform, and which it requires the State to perform."*

Id. at 638, 1 S. Ct. 601 (internal quotation marks omitted; emphasis added); *see also id.* at 638-39, 1 S. Ct. 601 ("The Fourteenth Amendment prohibits a State from depriving any person of life, liberty, or property

without due process of law, or from denying to any person the equal protection of the laws; but this provision does not add anything to the rights of one citizen against another. . . . The duty of protecting all its citizens in the enjoyment of an equality of rights was originally assumed by the States, and it remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guarantees, and no more. The power of the national government is limited to this guaranty." (citation omitted)); *Virginia v. Rives*, 100 U.S. 313, 318, 25 L.Ed. 667 (1879) ("The provisions of the Fourteenth Amendment of the Constitution have reference to State action exclusively, and not to any action of private individuals.").

Additionally, reasoned the Court, not only did section two apply to purely private conduct, but it also did so without regard to the conduct of the State in which the underlying crime occurred and without so much as requiring an individualized showing that the State had unconstitutionally deprived the particular victim of a right protected by the Fourteenth Amendment:

> The language of the amendment does not leave this subject in doubt. When the State has been guilty of no violation of its provisions; when it has not . . . denied to any person within its jurisdiction the equal protection of the laws; when, on the contrary, the laws of the State, as enacted by its legislative, and construed by its judicial, and administered by its executive departments, recognize and protect the right of all persons, the amendment imposes no duty and confers no power upon Congress.

> [Section two of the 1871 Act] is not limited to take effect only in case the State shall . . . deny to any person the equal protection of the laws. It applies, no matter how well the State may have performed its duty. Under it private persons are liable to punishment for conspiring to deprive any one of the equal protection of the laws enacted by the State.
>
> In the indictment in this case, for instance, . . . there is no intimation that the State [in which the acts occurred] has passed any law or done any act forbidden by the Fourteenth Amendment.

Harris, 106 U.S. at 639-40, 1 S. Ct. 601. Thus, in spite of the "strenuous [] insiste[nce]" by the United States that the Act fell within Congress' Section 5 power, *id.* at 637, 1 S. Ct. 601, and even after affording the statute the full presumption of constitutionality warranted for any enactment of Congress, *id.* at 635, 1 S. Ct. 601, the Court invalidated this section of the 1871 Civil Rights Act as having exceeded Congress' power under Section 5:

> As, therefore, the section of the law under consideration is directed exclusively against the action of private persons, without reference to the laws of the State, or their administration by her officers, we are *clear* in the opinion that it is not warranted by any clause in the Fourteenth Amendment to the Constitution.

Id. at 640, 1 S. Ct. 601 (emphasis added).

Later that same year, in the *Civil Rights Cases*, the Court similarly invalidated the public-accommodations provisions of the Civil Rights Act of 1875—provisions that are directly analogous to section 13981 in their

application to purely private conduct and establishment of civil liability—as beyond the scope of Congress' Section 5 enforcement power. The 1875 Act created a substantive right of equal access to "inns, public conveyances on land or water, theatres, and other places of public amusement . . . applicable alike to citizens of every race and color." 109 U.S. at 9, 3 S. Ct. 18 (quoting Civil Rights Act of 1875, § 1). In order to enforce the right, the Act authorized criminal penalties against those who violated the right, and further authorized persons aggrieved by violations of the Act to bring private causes of action for damages against those who denied them their rights to the enjoyment of public accommodations. *Id.*

Using language similar to that in *Harris*, the Court summarized the nature and extent of congressional enforcement power under Section 5 thus:

> [Section 5 of the Fourteenth Amendment] invests Congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited State laws and State acts, and thus to render them effectually null, void, and innocuous. *This is the legislative power conferred upon Congress, and this is the whole of it.* It does not invest Congress with power to legislate upon subjects which are within the domain of State legislation; but to provide modes of relief *against State legislation, or State action*, of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress *against the operation of State laws, and the action of State officers executive or judicial*, when these

> are subversive of the fundamental rights specified in the amendment. Positive rights and privileges are undoubtedly secured by the Fourteenth Amendment; but they are secured by way of prohibition against State laws . . . [and] by power given to Congress to legislate for the purpose of carrying such prohibition into effect; *and such legislation must necessarily be predicated upon such supposed State laws or State proceedings, and be directed to the correction of their operation and effect.*

Id. at 11-12, 3 S. Ct. 18 (emphases added). And, again, the Court explained that Congress may not regulate private conduct when legislating pursuant to Section 5:

> In fine, the legislation which Congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizen, but corrective legislation, that is, such as may be necessary and proper for counteracting such laws as the States may adopt or enforce, and which, by the amendment, they are prohibited from making or enforcing, or such acts and proceedings as the States may commit or take, and which, by the amendment, they are prohibited from committing or taking.

Id. at 13-14, 3 S. Ct. 18. A contrary interpretation of the Enforcement Clause, the Court emphasized, would permit Congress to regulate directly those rights protected against state interference by the Fourteenth Amendment, opening the floodgates to the promulgation of a congressional "code of municipal law regulative of all private rights between man and man in society." *Id.* at 13, 3 S. Ct. 18. Eventually, the Court observed, such would result in "Congress tak[ing] the place of the State legislatures and . . . supersed[ing] them" in a

manner "repugnant to the Tenth Amendment of the Constitution," *id.* at 15, 3 S. Ct. 18.

Turning to the statute at issue, the Court held that the first two sections of the 1875 Act, like section two of the Civil Rights Act of 1871 invalidated in *Harris*, exceeded Congress' Section 5 power. First, these provisions of the 1875 Act were illegitimate under the principle that Congress may not reach purely private conduct. As the Supreme Court put the point:

> An inspection of the law shows that it makes no reference whatever to any supposed or apprehended violation of the Fourteenth Amendment on the part of the States. It is not predicated on any such view. *It proceeds ex directo to declare that certain acts committed by individuals shall be deemed offences, and shall be prosecuted and punished by proceedings in the courts of the United States.*

Id. at 14, 3 S. Ct. 18 (emphasis added). Second, also like the provision at issue in *Harris*, the challenged provisions were not limited by their terms to take effect only in particular cases in which the plaintiff could make an individualized showing that the State had violated the victim's Fourteenth Amendment rights. *Id.* at 14, 3 S. Ct. 18 ("An inspection of the law shows that it makes no reference whatever to any supposed or apprehended violation of the Fourteenth Amendment on the part of the States."). Rather, the provisions "applie[d] equally to cases arising in States which have the justest laws respecting the personal rights of citizens, and whose authorities are ever ready to enforce such laws, as to those which arise in States that may have violated the prohibition of the amendment." *Id.* The Court concluded, therefore, that the Act was "not corrective

legislation," but rather was "primary and direct," "tak[ing] immediate and absolute possession of the subject of the right of admission to inns, public conveyances, and places of amusement." *Id.* at 19, 3 S. Ct. 18.

Finally, and in stark contrast to the approach urged on us by appellants, the Court emphasized, as it had in *Harris*, that a court entertaining a Section 5 challenge is *not* simply to defer to the apparent conclusion of Congress that the statute is within its constitutional powers, but rather is duty-bound to form "an independent judgment" regarding the constitutionality of the statute and to "exercise [that judgment] according to the best lights" available to the court. *Id.* at 10, 3 S. Ct. 18. Exercising such judgment, the Court held that the provisions of the 1875 Act were not a permissible exercise of Section 5 power, and *inter alia* affirmed the judgments for the defendants, including the defendant in the private cause of action.

In later cases, such as *United States v. Guest*, 383 U.S. 745, 86 S. Ct. 1170, 16 L.Ed.2d 239 (1966),[24] the

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[24] At issue in *Guest* was whether certain indictments stated chargeable offenses under 18 U.S.C. § 241, a statute that prohibits conspiracies to deprive persons of constitutional rights. The disputed indictments in *Guest* alleged that certain white citizens conspired for the purpose of interfering with various constitutional rights of black citizens, including their rights to equal utilization of public facilities and to interstate travel. The Supreme Court reversed the lower court's dismissal of the indictments for failure to state a chargeable offense. With respect to the counts in the indictment alleging that the defendants interfered with the victims' right to "equal utilization, without discrimination upon the basis of race, of public facilities," *Guest*, 383 U.S. at 753, 86 S. Ct. 1170, the Court concluded, as a matter of statutory construction, that such a right was protected by § 241 to the extent that it was protected by the Equal Protection Clause. *Id.* at 754, 86 S. Ct. 1170. It then held

Supreme Court clarified that the state action limitation on Congress' power under Section 5 permits Congress to regulate not only the States themselves and those on the States' payroll, but also those individuals who, through active connivance or conspiracy with the State, in effect act under color of state law or otherwise on behalf of the State. But the Court has never overruled

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that the indictment stated a chargeable offense because it alleged sufficient state involvement in the conspiracy—"active connivance" between the private defendants and state officials—for the conspiracy to fall within the prohibitions of the Equal Protection Clause under state action principles. *Id.* at 756-57, 86 S. Ct. 1170 ("[T]he allegation is broad enough to cover a charge of active connivance by agents of the State in the making of the 'false reports,' or other conduct amounting to official discrimination."). Therefore, the Court in *Guest* at most extended the Fourteenth Amendment's state action concept to include those who act in cooperation and active connivance with the State. *Cf. United States v. Price*, 383 U.S. 787, 86 S. Ct. 1152, 16 L.Ed.2d 267 (1966) (holding that involvement of a sheriff, deputy sheriff, and a patrolman in lynching conspiracy was sufficient to render the conspiracy under color of state law).

Because the Court construed this count to allege state interference with a right protected by the Equal Protection Clause, it did not address the question whether Congress could, under Section 5, proscribe private conduct without any nexus to state action. The Court similarly did not consider whether Congress could regulate wholly private conduct in the course of reinstating the other counts in the indictment that alleged a private interference with the victims' constitutional right to travel. In reinstating these counts, the Court emphasized that "the constitutional right of interstate travel is a right secured against interference from any source whatever, whether governmental or private," and it "reiterate[d] that the right to travel freely from State to State finds constitutional protection that is *quite independent of the Fourteenth Amendment*." *Guest*, 383 U.S.at 760 n. 17, 86 S. Ct. 1170 (emphasis added)

either *Harris* or the *Civil Rights Cases*.[25] And, since *Harris* and the *Civil Rights Cases*, when the Court has

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[25] *See, e.g., Romer v. Evans*, 517 U.S. 620, 628, 116 S. Ct. 1620, 134 L.Ed.2d 855 (1996) (citing the *Civil Rights Cases* for the proposition that "it was settled early that the Fourteenth Amendment did not give Congress a general power to prohibit discrimination in public accommodations"); *Lugar*, 457 U.S. at 936, 102 S. Ct. 2744 (citing *Civil Rights Cases* and stating that "[c]areful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of *federal law and federal judicial power*" (emphasis added)); *Blum*, 457 U.S. at 1002, 102 S. Ct. 2777 (citing *Civil Rights Cases* as origin of the "firmly embedded" doctrine that Section 1 only protects against state action (internal quotations omitted)); *Moose Lodge*, 407 U.S. at 172, 92 S. Ct. 1965 (citing *Civil Rights Cases* as "set[ting] forth the essential dichotomy" between state and private action); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2, 90 S. Ct. 1598, 26 L.Ed.2d 142 (1970) (declining to reconsider the Section 5 holding of the *Civil Rights Cases*); *Collins v. Hardyman*, 341 U.S. 651, 657-58, 71 S. Ct. 937, 95 L.Ed. 1253 (1951) (noting that *Harris* was "in harmony with . . . other important decisions during that period [of *Cruikshank* and the *Civil Rights Cases*] by a Court, every member of which had been appointed by President Lincoln, Grant, Hayes, Garfield or Arthur—all indoctrinated in the cause which produced the Fourteenth Amendment, but convinced that it was not to be used to centralize power so as to upset the federal system" (footnote omitted)); *United States v. Williams*, 341 U.S. 70, 71 S. Ct. 581, 95 L.Ed. 758 (1951) (opinion of Frankfurter, J.) ("[W]e have consistently held that the category of rights which Congress may constitutionally protect from interference by private persons excludes those rights which the Constitution merely guarantees from interference by a State."), *overruled by United States v. Price*, 383 U.S. 787, 798, 86 S. Ct. 1152, 16 L.Ed.2d 267 (1966) (overruling *Williams* construction of 18 U.S.C. § 241 and holding that statute extends to conspiracies to interfere with Fourteenth Amendment where conspirators acted under color of state law); *United States v. Powell*, 212 U.S. 564, 564-65, 29 S. Ct. 690, 53 L.Ed. 653 (1909) (per curiam) (holding that individual right to a fair trial in state court cannot be constitutionally vindicated by

upheld the application of civil rights statutes to purely private conduct, it has conspicuously done so under provisions of the Constitution other than Section 5 which are not subject to state-action requirements.[26]

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a federal prosecution of private persons); *Ex Parte Virginia*, 100 U.S. 339, 346, 25 L.Ed. 676 (1879) ("The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power. It is these which Congress is empowered to enforce, and to enforce *against State action*, however put forth, whether that action be executive, legislative, or judicial." (emphasis added)); *id.* at 347 (legislation pursuant to section 5 "must act upon persons, not upon the abstract thing denominated a State, but upon the persons who are *the agents of the State* in the denial of the rights which were intended to be secured" (emphasis added)); *United States v. Cruikshank*, 92 U.S. 542, 555, 23 L.Ed. 588 (1875) ("The only obligation resting upon the United States [under the Fourteenth Amendment] is to see that the States do not deny the right [to equal protection of the laws]. This the amendment guarantees, but no more. The *power* of the national government is limited to the enforcement of this guaranty." (emphasis added)); *cf. James v. Bowman*, 190 U.S. 127, 139, 23 S. Ct. 678, 47 L.Ed. 979 (1903) ("These authorities show that a statute which purports to punish purely individual action cannot be sustained as an appropriate exercise of the power conferred by the Fifteenth Amendment upon Congress to prevent action by the State through some one or more of its official representatives. . . .").

[26] *See, e.g., Guest*, 383 U.S. at 757, 86 S. Ct. 1170 (upholding action under precursor to section 241 against private conspiracy to interfere with constitutional right to travel); *Ex Parte Yarbrough*, 110 U.S. 651, 665, 4 S. Ct. 152, 28 L.Ed. 274 (1884) (upholding private action under precursor to section 241 against private conspiracy to interfere with right to vote in federal elections); *Griffin v. Breckenridge*, 403 U.S. 88, 105, 91 S. Ct. 1790, 29 L.Ed.2d 338 (1971) (upholding action brought under 42 U.S.C. § 1985(3) against private individuals as an exercise of congressional power to enforce the Thirteenth Amendment); *United Bhd. of Carpenters and Joiners v. Scott*, 463 U.S. 825, 833, 103 S. Ct. 3352, 77 L.Ed.2d 1049 (1983) (refusing to extend 42 U.S.C. § 1985(3) to private

Thus, not only under the text and legislative history of the Fourteenth Amendment, but also under a consistent line of Supreme Court cases from *Harris* and the *Civil Rights Cases* to *City of Boerne*, it is now well established that, under the Fourteenth Amendment, Congress may adopt "appropriate legislation" to "enforce" its affirmative prohibitions against *state* action and action taken under color of state law. Congress may also regulate the conduct of nominally private persons who act in connivance with the State or whose conduct receives the "imprimatur of the State." And, although the Supreme Court has never so held and has not addressed the issue in recent years, it has left open the possibility that Congress may regulate private conduct pursuant to a statute that applies only on an individualized showing of a State's violation of the Fourteenth Amendment. But Congress may not regulate purely private conduct under the Fourteenth Amendment. On this the Court has never wavered.

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conspiracies "aimed at a right [e.g., free speech] that is by definition a right only against state interference"); *id.* (reciting in dictum that even if § 1985(3) did cover private interference with rights not to associate with a labor union, such would be constitutional under the Commerce Clause); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439, 88 S. Ct. 2186, 20 L.Ed.2d 1189 (1968) (upholding action under 42 U.S.C. § 1982 against private individuals as an exercise of congressional power to enforce the Thirteenth Amendment); *Runyon v. McCrary*, 427 U.S. 160, 179, 96 S. Ct. 2586, 49 L.Ed.2d 415 (1976) (same for 42 U.S.C. § 1981); *Heart of Atlanta*, 379 U.S. at 249-50, 85 S. Ct. 348 (noting that "Congress based the [Civil Rights] Act [of 1964] on § 5 and the Equal Protection Clause of the Fourteenth Amendment as well as its power to regulate interstate commerce," but concluding that "since the commerce power is sufficient for our decision here we have considered it alone").

2.

City of Boerne, *Harris*, the *Civil Rights Cases*, and the principles underlying these cases confirm beyond question that section 13981 cannot be sustained under the Enforcement Clause of the Fourteenth Amendment. Section 13981 unmistakably regulates private action; it creates a cause of action against private individuals who commit acts of gender-motivated violence. Under section 13981, liability is not limited to the States, to their officials, to those who act under color of state law, or even to those who actively conspire with state officials. *See* 42 U.S.C. § 13981(c). Section 13981, like the statutes invalidated in *Harris* and the *Civil Rights Cases*, "proceeds *ex directo* to declare that certain acts committed by individuals shall be deemed offences, and shall be prosecuted and punished by proceedings in the courts of the United States." *Civil Rights Cases*, 109 U.S. at 14, 3 S. Ct. 18; *cf.* 42 U.S.C. § 13981(b) ("All persons within the United States shall have the right to be free from crimes of violence motivated by gender."). Indeed, the complaint in the instant case, which clearly states a claim under the statute—at least as to appellee Morrison—*see supra* Part II, does not even intone, much less allege, that appellees Morrison or Crawford are state actors, that they acted under color of state law, or that they otherwise conspired with state officials to deprive appellant Brzonkala of her rights guaranteed by the Equal Protection Clause.

Further, like the statutes invalidated in *Harris* and the *Civil Rights Cases*, section 13981 is not limited to take effect only upon an individualized showing of unconstitutional state action. Indeed, liability under section 13981 attaches without regard to whether the

State adequately enforced its applicable criminal or civil laws. The statute even applies where, as here, no prior criminal or state civil complaint was even filed. 42 U.S.C. § 13981(d)(2)(A) (cause of action may lie without regard to whether the predicate acts of violence "have actually resulted in criminal charges, prosecution, or conviction"); *id.* § 13981(e)(2) ("[n]othing in this section requires a prior criminal complaint, prosecution, or conviction to establish the elements of a cause of action"). Like the law invalidated by the Supreme Court in *Harris*, section 13981 is "directed exclusively against the action of private persons, without reference to the laws of the States or their administration by her officers." *Harris*, 106 U.S. at 640, 1 S. Ct. 601. Section 13981 imposes liability for gender-motivated acts of violence, regardless of whether the predicate act of violence occurs in a State that at the time has "the justest laws" and authorities "ever ready to enforce such laws," *Civil Rights Cases*, 109 U.S. at 14, 3 S. Ct. 18, or whether it occurs in a State that has unconstitutionally turned a blind eye toward or deliberately contributed to or participated in the particular act of violence.

The absence of any such jurisdictional limitations confirms that section 13981, much like the provisions of the Civil Rights Acts of 1871 and 1875 invalidated by the Supreme Court in *Harris* and the *Civil Rights Cases* respectively, is not legislation designed to "correct[] the effects of such prohibited State laws and State acts, and thus to render them effectually null, void, and innocuous," *id.* at 11, 3 S. Ct. 18,but rather is "primary and direct" legislation that "takes immediate and absolute possession of the subject of" individual acts of violence. *Id.* at 19, 3 S. Ct. 18. This is precisely

the type of statute that the Supreme Court warned over a century ago would, if held valid under Section 5 of the Fourteenth Amendment, authorize a congressional "municipal code" through which the federal government could act directly upon all the rights of life, liberty, and property of all citizens and thereby eliminate altogether any role for the several States.

Accordingly, although we afford section 13981 the full presumption of constitutionality due an enactment of a coordinate branch of the federal government, we must hold, in spite of the "strenuous[ ]insist[ence]" of the government to the contrary, *see Harris*, 106 U.S. at 637, 1 S. Ct. 601, that section 13981 simply cannot be sustained under Section 5 of the Fourteenth Amendment.

B.

In obvious recognition of these fundamental principles, as well as the import, for the arguments they advance, of *Harris*, the *Civil Rights Cases*, and the modern precedents reaffirming the broader holdings of these cases as to the scope of Section 1 and Section 5, appellants attempt variously to argue that *Harris* and the *Civil Rights Cases* are distinguishable, that they have been *sub silentio* overruled or qualified, and that they have been explicitly repudiated by the Supreme Court and other authorities. But none of these arguments is availing, as appellants themselves appear to understand.

1.

Albeit maunderingly, appellants first attempt to distinguish *Harris* and the *Civil Rights Cases*, contending that, in these cases, the Court only limited Congress' power to regulate private conduct as an *end* in itself, and that those cases are inapplicable where, as here,

Congress regulates such conduct not as an end in itself but only as a *means* to the legitimate end of remedying unconstitutional state action. To prove that *Harris* and the *Civil Rights Cases* were thus reasoned, appellants identify three features of the Civil Rights Acts invalidated in those cases, features that they argue establish that those statutes were enacted not out of concern for state deprivations of equal protection, but rather only out of concern for purely private conduct. Having so characterized the 1871 and 1875 Civil Rights Acts and Congress' motives in enacting those statutes, appellants argue that the Supreme Court's reasoning in invalidating those Acts establishes only that legislation passed for the exclusive purpose of addressing private conduct, unrelated to any concern for actions by the States, is impermissible under Section 5. Appellants then claim that the Civil Rights Acts of 1871 and 1875 differ from section 13981 in that Congress' concern in the latter was with unconstitutional conduct by the States and, accordingly, section 13981 is a permissible exercise of Congress' remedial power under Section 5.

The obvious flaw in this argument—apart from the fact that it finds no support whatsoever in the opinions of the Court in *Harris* and the *Civil Rights Cases* and, in fact, directly contradicts the reasoning of those cases—is its central premise that Congress enacted the Civil Rights Acts of 1871 and 1875 only out of a concern with private conduct and without any concern for unconstitutional conduct by the States. This premise is demonstrably incorrect, as even a cursory examination of the legislative history surrounding passage of these Acts discloses. Indeed, as an historical matter, it is indisputable that Congress enacted those civil rights laws for the precise purpose of remedying massive and

systemic violations of equal protection by the States. That such was Congress' motive in passing the 1871 Act is evident from the following statement as to the law's purpose by Representative James Garfield, a statement that was frequently echoed by Representative Garfield's colleagues:

> [T]he chief complaint is not that the laws of the State are unequal, but that even where the laws are just and equal on their face, yet, by a systematic maladministration of them, or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them.

Cong. Globe, 42d Cong., 1st Sess. app. 153 (1871) (statement of Rep. Garfield); *see also id.* at 653 (statement of Sen. Osborn) ("The State courts . . . are utterly powerless. . . . Justice is mocked, innocence punished, perjury rewarded, and crime defiant in the halls of justice"); *id.* at 457 (statement of Rep. Coburn) ("We find that the commission of a certain class of high crimes is not noticed; that the offenders are not arrested, put on trial, or punished"); *id.* at 481 (statement of Rep. Wilson); *id.* at app. 78 (statement of Rep. Perry) ("Sheriffs, having eyes to see, see not; judges, having ears to hear, hear not; witnesses conceal the truth or falsify it; grand and petit juries act as if they might be accomplices."). And it is no less clear that the 1875 Act was passed for the same purpose. As Senator Sumner, by reference to the South Carolina legislature, representatively described the Congress' concern with the States' nonenforcement of their laws:

> The Legislature of South Carolina has passed a law giving precisely the right contained in your "supplementary civil rights bill." But such a law remains a dead letter on her statute-books, because the State courts, comprised largely of those whom the Senator wishes to obtain amnesty for, refuse to enforce it.

Cong. Globe, 42d Cong., 2d Sess. 430 (1872) (quoting Letter of F.L. Cardozo, South Carolina Secretary of State) (internal quotation marks omitted); *see also id.* at 726; 2 Cong. Rec. 383 (1874) (statement of Rep. Ransier) ("Mr. Speaker, the States will not give us protection in these matters, and well do these 'State-rights' men know this."); *id.* at 457 (statement of Rep. Butler) ("The learned gentleman from Georgia [Mr. Stephens] agrees with me that every colored man now has all the rights which this bill gives him, but insists it is the States' duty to enforce them. But because of prejudice the States will not enforce them."); 3 Cong. Rec. 945 (1875) (statement of Rep. Lynch) ("You may ask why we do not institute civil suits in the State courts. What a farce! Talk about instituting a civil-rights suit in the State courts of Kentucky, for instance, where the decision of the judge is virtually rendered before he enters the court-house, and the verdict of the jury substantially rendered before it is impaneled . . . . "); 2 Cong. Rec. 427(statement of Rep. Stowell); 3 Cong. Rec. app. 15 (statement of Rep. White).

In light of this legislative history—not to mention the contemporaneous history generally—it borders on the frivolous to contend, as appellants do, that Congress was unconcerned with violations of equal protection by the States when it enacted the Civil Rights Acts of 1871 and 1875.[27]

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[27] Appellants note that the Supreme Court did not cite this widely known legislative history in its opinions in *Harris* and the

Not only is the central premise of appellants' attempted distinction of *Harris* and the *Civil Rights Cases* demonstrably incorrect, but, ironically although not surprisingly, an examination of the purported differences between section 13981 and the Civil Rights Acts of 1871 and 1875, upon which appellants' attempted distinction rests, proves beyond question the applicability of the analysis of Congress' Section 5 enforcement power in *Harris* and the *Civil Rights Cases* and the unconstitutionality of section 13981 under these authorities.

First, appellants contend that the 1871 and 1875 Acts "fail[ed] to reference any Fourteenth Amendment violation by the States" and did not "respond[ ] to state officials' constitutional violations," Br. of Appellant Brzonkala at 30, and they contrast this legislative history with the legislative history of section 13981, which they contend clearly reveals that Congress enacted section 13981 in response to state-sponsored discrimination against women, *see* Br. of Intervenor United States at 22 n.11 (distinguishing section 13981 because it "respond[s] to systemic state equal protection violations"); Br. of Appellant Brzonkala at 30 (section 13981 "has none of [the] defects" identified by the Supreme Court in the *Civil Rights Cases* because Congress in enacting section 13981 "found a 'classic' denial of equal protection by state law enforcement

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Civil Rights Cases. However, if not as a matter of common sense, then from the Supreme Court's statement that it had "carefully considered" "the views and arguments of distinguished senators, advanced while the [1875] law was under consideration, claiming authority to pass it by virtue of that amendment," *Civil Rights Cases*, 109 U.S. at 10, 3 S. Ct. 18, it is apparent that the Supreme Court was fully aware of this history.

systems" and "specifically sought to remedy the equal protection violations resulting from the States' failings"); Reply Br. of Appellant Brzonkala at 11 (asserting that "Congress' express purpose [in enacting section 13981], documented throughout the legislative history, including the Conference Report, [was] to correct historic state-sponsored commission and tolerance of gender-based violence" (citation omitted)). As we explain, however, contrary to appellants' breathtaking a historicism, the legislative history of the 1871 and 1875 Acts not only evidences a concern with conduct by the States violative of the Equal Protection Clause, it evinces a considerably more profound concern with even more open and obvious violations of that Clause by the States than does the legislative history of section 13981. *Compare supra* at 871 (1871 and 1875 Acts were enacted in response to massive and open refusal of southern States to enforce the civil rights of blacks) *with* S. Rep. No. 102-197, at 39; H.R. Conf. Rep. No. 103-711, at 385, *reprinted in* 1994 U.S.Code Cong. & Admin. News at 1853 (Congress' concern in enacting section 13981 was with "subtle" types of "bias" against women), *and infra* Part IV.C.3.b (Congress was primarily concerned with private conduct and public attitudes, not with state action, whether constitutional or unconstitutional.). Indeed, appellants' assertions that Congress found a "classic" denial of equal protection in enacting section 13981 cannot be understood except as an attempted comparison between the States' treatment of women today and the southern States' treatment of the freed slaves after the Civil War.

Next, the government contends that the Acts of 1871 and 1875, unlike section 13981, imposed the same "con-

stitutional norms" upon private individuals that the Equal Protection Clause imposes upon the States. However, section 13981 is no less "premised on the explicit assumption that purely private conduct could violate the Fourteenth Amendment," Reply Br. of Intervenor United States at 3, and no less represents a "congressional attempt[] to apply the affirmative requirements of the Fourteenth Amendment to purely private conduct," *id.*, than did the Civil Rights Acts of 1871 and 1875. *Compare United States v. Virginia*, 518 U.S. 515, 116 S. Ct. 2264, 135 L.Ed.2d 735 (1996) (gender discrimination by State violates Equal Protection Clause), *with* 42 U.S.C. § 13981(b) (prohibiting gender-motivated discrimination performed by private individuals); S. Rep. No. 103-138, at 55 (section 13981 is "appropriate" legislation because, *inter alia*, "it attacks gender-motivated crimes that threaten women's equal protection of the laws").

Finally, the government contends that the Civil Rights Acts of 1871 and 1875 criminalized private conduct that was not already prohibited under state law, *see, e.g., id.* at 4-5 (asserting that the 1871 and 1875 Acts "prohibit[ed] . . . conduct . . . not already prohibited . . . by law," laid "'down rules for the conduct of individuals in society toward[s] each other,'" and thus "'create[d] a code of municipal law for the regulation of private rights'") (quoting *Civil Rights Cases*, 109 U.S. at 11, 14, 3 S. Ct. 18), whereas section 13981 does not "prohibit . . . any conduct that is not already prohibited . . . by [state] law," Reply Br. of Intervenor United States at 5, but instead merely creates a federal remedy that may be pursued when the States fail to enforce their own laws, *id.* ("This structure reflects the wholly remedial purpose of the statute:

it corrects for deficiencies in the administration of state law by providing a federal remedy."). In fact, however, not only do the Civil Rights Acts of 1871 and 1875 actually appear only to have prohibited conduct that was already prohibited by the States (and simply not prosecuted), *see, e.g., supra* at 871 (citing legislative history of 1871 and 1875 Acts stating that the conduct regulated by those statutes was already prohibited under state law but under enforced); *Civil Rights Cases*, 109 U.S. at 25, 3 S. Ct. 18 ("Innkeepers and public carriers, by the laws of *all* the states, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodation to all unobjectionable persons who in good faith apply for them." (emphasis added)), but, contrary to the government's suggestion, section 13981 actually does criminalize a substantial range of conduct not prohibited under state law, *see supra* Part III.C (section 13981 abrogates interspousal and intrafamily tort immunities, the marital rape exception, and other defenses that might exist under state law by virtue of the relationship between the violent actor and the victim). Section 13981 even creates a substantive federal criminal standard below which no State may deviate, *see supra id.* (section 13981 creates a federal cause of action for conduct occurring anywhere within the United States that satisfies federal definitions of various violent felonies).

In sum, a careful consideration of the differences between section 13981 and the Civil Rights Acts asserted by the government confirms both that *Harris* and the *Civil Rights Cases* are, in the relevant respects, controlling authorities as to the instant case and that section 13981 is an impermissible exercise of Congress' power under Section 5. In fact, even if appellants' read-

ing of *Harris* and the *Civil Rights Cases* were correct (which it is not), section 13981 would be even more clearly unconstitutional than were the Acts of 1871 and 1875.

Under the state action principles of *Harris* and the *Civil Rights Cases*, which, it bears repeating, have been consistently and recently reaffirmed by the Supreme Court, section 13981 is invalid, regardless of whether its end is to remedy unconstitutional state action, for the simple reason that it regulates purely private conduct and is not limited to individual cases in which the state has violated the plaintiff's Fourteenth Amendment rights. These are the same constitutional defects that inhered in the Civil Rights Acts of 1871 and 1875.

2.

Evidently aware of the speciousness of these distinctions and, ultimately, of the fundamental premise on which they rest, appellants argue in the alternative that *Harris* and the *Civil Rights Cases* have been tacitly overruled by, or at least qualified by analogy to, the distinct line of cases holding that Congress may, as a "prophylactic" measure under Section 5, proscribe some conduct that does not violate Section 1 of the Fourteenth Amendment. *City of Boerne*, 117 S. Ct. at 2163 ("Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional . . . ."); *Katzenbach v. Morgan*, 384 U.S. 641, 648-49, 86 S. Ct. 1717, 16 L.Ed.2d 828 (1966)(similar); *cf. City of Rome v. United States*, 446 U.S. 156, 173-78, 100 S. Ct. 1548, 64 L.Ed.2d 119 (1980) (Enforcement Clause of Fifteenth Amendment); *South Carolina v. Katzenbach*, 383 U.S. 301, 324-27, 86 S. Ct. 803, 15 L.Ed.2d 769 (1966) (same).

That is, appellants argue, just as Congress may prohibit the States from employing voting literacy tests as "appropriate legislation" to "enforce" the Reconstruction Amendments, even though the Supreme Court has upheld the facial constitutionality of such tests under those Amendments, *compare id.* at 337, 86 S. Ct. 803 (upholding congressional ban on voting literacy tests), *with Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 53-54, 79 S. Ct. 985, 3 L.Ed.2d 1072 (1959) (upholding facial constitutionality of voting literacy tests), so too may Congress regulate purely private violence against women as "appropriate legislation" to "enforce" the Equal Protection Clause, even though such private violence does not violate the Clause itself. Thus, although appellants concede, as they must, that wholly private acts of gender-motivated violence can never violate the Equal Protection Clause, *see, e.g., Collins v. Hardyman*, 341 U.S. 651, 658, 71 S. Ct. 937, 95 L.Ed. 1253 (1951) (stating that "the principle has become firmly embedded in our constitutional law" that "[the Fourteenth] Amendment erects no shield against merely private conduct, however discriminatory or wrongful" (internal quotation marks and footnote omitted)), they nonetheless contend that, under the *Katzenbach v. Morgan* and *South Carolina v. Katzenbach* line of cases, Congress may regulate such private violence as a means of remedying the bias and discrimination against women in the States' criminal justice systems, which "often deprive[ ] victims of crimes of violence motivated by gender of equal protection of the laws and the redress to which they are entitled," H.R. Conf. Rep. No. 103-711, at 385, *reprinted in* 1994 U.S.Code Cong. & Admin. News at 1853.

Appellants are doubtless correct that Congress may, pursuant to Section 5, prophylactically regulate or proscribe certain state conduct that does not violate Section 1 of the Fourteenth Amendment. In the prophylactic cases, however, the Court has only upheld federal statutes that prohibited *state* action; it has never upheld statutes, like section 13981, that prohibited *private* action. None of the prophylactic cases (nor any other Supreme Court case) holds or suggests that Congress may employ such a rationale to reach purely private conduct.

Recognizing as much, appellants ask us to extend these prophylactic cases to permit Congress to regulate purely private conduct, insisting that there is "no constitutional precept" for limiting these prophylactic cases to federal legislation that proscribes *state* conduct. Br. of Intervenor United States at 24. The "constitutional precept" that limits the prophylactic cases to their context, however, is the Fourteenth Amendment itself, which provides that "[n]o *State* shall" deny any person equal protection of the laws, and accords Congress only the power to "enforce" "the provisions of *this* article." U.S. Const. amend. XIV, §§ 1, 5 (emphases added). Because the Fourteenth Amendment only prohibits action by the States, the prophylactic rationale of cases like *Katzenbach v. Morgan*, *South Carolina v. Katzenbach*, and *City of Boerne* is simply inapplicable where, as here, Congress attempts to regulate purely private conduct, because such private conduct can *never* violate Section 1 of the Fourteenth Amendment.

In *South Carolina v. Katzenbach*, for example, the Supreme Court sustained a federal statute that categorically prohibited certain States from imposing voting literacy requirements, even though the Court

had upheld the facial constitutionality of such literacy tests in cases such as *Lassiter*. But it did so because such tests could be *applied* in a racially unconstitutional manner in many circumstances. *See Lassiter*, 360 U.S. at 53, 79 S. Ct. 985; *South Carolina v. Katzenbach*, 383 U.S. at 309, 328, 329-30, 334, 86 S. Ct. 803; *Oregon v. Mitchell*, 400 U.S. 112, 131-34, 91 S. Ct. 260, 27 L.Ed.2d 272 (1970) (opinion of Black, J.). The reasoning of the case, and of the like prophylactic cases, therefore, is simply that Congress may categorically prohibit the States from enacting or enforcing certain types of constitutional laws in order to "remedy" the significant likelihood that such laws will be applied unconstitutionally in a manner that could be either difficult to detect in particular instances or otherwise difficult to remedy in case-by-case judicial proceedings. *See, e.g., South Carolina v. Katzenbach*, 383 U.S. at 313-15, 327-29, 86 S. Ct. 803.

Although it makes sense for Congress, as a prophylactic measure, to proscribe categorically a type of state law that is facially constitutional in order to prevent that law's certain and frequent unconstitutional application, *cf. City of Boerne*, 117 S. Ct. at 2170 ("Preventive measures prohibiting certain types of laws may be appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a *significant likelihood* of being unconstitutional." (emphasis added)), it makes no sense at all to extend such reasoning to purely private conduct that can *never* violate the prohibition that "[n]o State" deny any person the "equal protection of the laws." U.S. Const. amend. XIV, § 1. Indeed, we would have to stretch the "prophylactic" rationale well beyond recognition in order to permit Congress to regulate purely private

conduct that can never be unconstitutional, on the strength of a generalized concern over potentially unconstitutional conduct by the States. Such freewheeling prophylaxis would, in effect, transmogrify the actual Fourteenth Amendment into the Bingham Amendment, which was defeated for the very reason that it would have permitted Congress thus to secure directly the life, liberty, property, and equality rights of all citizens. *See supra* Part IV.A.1; *see also City of Boerne*, 117 S. Ct. at 2166 (quoting statement of Representative Garfield that "we cannot, by any reasonable interpretation, give to [§ 5] . . . the force and effect of the rejected [Bingham] clause").

It is not surprising, in light of the fundamental distinction drawn in the Fourteenth Amendment between action by the States and private action, that the Supreme Court itself has never treated the prophylactic line of cases upon which appellants rely as having *sub silentio* overruled *Harris* and the *Civil Rights Cases*. In fact, during the very period of time in which the Supreme Court was deciding several of the prophylactic cases, *see, e.g.*, *South Carolina v. Katzenbach*, 383 U.S. 301, 86 S. Ct. 803, 15 L.Ed.2d 769 (1966); *Katzenbach v. Morgan*, 384 U.S. 641, 86 S. Ct. 1717, 16 L.Ed.2d 828 (1966); *Oregon v. Mitchell*, 400 U.S. 112, 91 S. Ct. 260, 27 L.Ed.2d 272 (1970), it was scrupulously adhering to, and conspicuously refusing to overrule, *Harris* and the *Civil Rights Cases* in cases such as *Guest*, *Griffin*, and *Jones*. *See supra* Part IV.A.1; *see also Guest*, 383 U.S. at 762 n. 1, 86 S. Ct. 1170 (Harlan, J., concurring in part and dissenting in part) (asserting that the Section 5 issue was "deliberately not reached" by the majority in that case). And, as we discuss above at pages [112a-115a] and note 25, the Supreme Court

has consistently affirmed the state-action principles of *Harris* and the *Civil Rights Cases*, even as recently as two years ago. *See City of Boerne*, 117 S. Ct. at 2166.

Rather than grapple with this basic textual, historical, and precedential distinction between laws regulating *state* action and laws regulating *private* conduct, the government instead resorts to speculation and hypothesizing as to why Congress' power to regulate state action that does not necessarily violate the Fourteenth Amendment entails a congressional power to regulate private conduct that can never violate the Fourteenth Amendment.

In this regard, the government argues, first, that congressional regulation of private conduct may in this case be a less "flawed or ineffective" remedy than direct regulation of the States. Br. of Intervenor United States at 25. For example, the government hypothesizes that "[p]roviding a cause of action against the state or state officials might create unseemly pressures on state officials to prosecute, even if the evidence of the defendant's guilt was weak, if the victim seemed poised to sue." *Id.* As the Supreme Court held in this precise context, however, "[w]hether it would not have been a more effective protection of the rights of citizens to have clothed Congress with plenary power over the whole subject, is not now the question. What we have to decide is, whether such plenary power has been conferred upon Congress by the Fourteenth Amendment; and, in our judgment, it has not." *Civil Rights Cases*, 109 U.S. at 19, 3 S. Ct. 18. In any event, the government's argument assumes that the only alternative to section 13981 is to permit a private plaintiff to bring an action for damages against the State or its officers and ignores the possibility that Congress could

have simply nullified a category of state laws that discriminate against women. Moreover, the government's expressed concerns of *over enforcement* lack credibility; it strikes us as particularly suspicious that the government would, on the one hand, dramatize the need for section 13981 by trumpeting the "massive" evidence of underenforcement of criminal laws due to bias and discrimination against women, and, on the other hand, defend the constitutionality of section 13981 on the grounds that a remedy against the very source of this "massive" state discrimination would lead to a rash of frivolous and fraudulent strike suits by women "poised to sue." In fact, it seems to us that this line of argument appears to all but concede that section 13981 was not designed to remedy the States' discriminatory exercise of prosecutorial discretion—a concession that puts the lie to the government's argument that section 13981 is truly aimed at remedying state law-enforcement failures rather than at purely private acts of violence.

The government maintains, second, that in enacting section 13981, Congress might have chosen to regulate private action, rather than the States directly, so as not to offend the sovereignty of the States. This argument, however, confuses the Fourteenth Amendment with the Commerce Clause and other similar grants of federal power. The Supreme Court has often held that it violates principles of state sovereignty for the federal government to impose certain obligations directly upon the States when acting pursuant to the federal power to regulate interstate commerce, *see, e.g., Printz v. United States*, 521 U.S. 98, 117 S. Ct. 2365, 138 L.Ed.2d 914 (1997); *New York v. United States*, 505 U.S. 144, 112 S. Ct. 2408, 120 L.Ed.2d 120 (1992), and various other

federal powers, *see, e.g., Kentucky v. Dennison*, 24 How. 66, 16 L.Ed. 717 (1860) (Extradition Clause); *Collector v. Day*, 11 Wall. 113, 20 L.Ed. 122 (1870) (Taxation power); *James v. Dravo Contracting Co.*, 302 U.S. 134, 58 S. Ct. 208, 82 L.Ed. 155 (1937) (same); *Hans v. Louisiana*, 134 U.S. 1, 10 S. Ct. 504, 33 L.Ed. 842 (1890) (Article III). However, the Court has made clear that, by its very nature, the Fourteenth Amendment is a limitation on the governments of the States, *Fitzpatrick v. Bitzer*, 427 U.S. 445, 453, 96 S. Ct. 2666, 49 L.Ed.2d 614 (1976) (reasoning that the Fourteenth Amendment "quite clearly contemplates limitations on [the States'] authority" and "[t]he substantive provisions are by express terms directed at the States"); *Ex Parte Virginia*, 100 U.S. 339, 346, 25 L.Ed. 676 (1879) ("The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power. It is these which Congress is empowered to enforce, and to enforce against State action, however put forth, whether that action be executive, legislative, or judicial."), and therefore that it "is no invasion of State sovereignty" for the federal government to impose obligations directly upon the States when enforcing the Fourteenth Amendment. *Id. Compare Fitzpatrick*, 427 U.S. at 456, 96 S. Ct. 2666 (holding that state sovereign immunity may be abrogated by federal statute enacted pursuant to Section 5 of the Fourteenth Amendment), *and EEOC v. Wyoming*, 460 U.S. 226, 243 n. 18, 103 S. Ct. 1054, 75 L.Ed.2d 18 (1983) ("[W]hen properly exercising its power under § 5, Congress is not limited by the same Tenth Amendment constraints that circumscribe the exercise of its Commerce Clause powers."), *with Seminole Tribe v. Florida*, 517 U.S. 44, 72, 116 S. Ct. 1114, 134 L.Ed.2d 252 (1996) (holding that state

sovereign immunity may not be abrogated by federal statute enacted pursuant to Indian or Interstate Commerce Clauses). In fact, if anything, it may well be federal regulation of *private* conduct pursuant to the Fourteenth Amendment that poses the greater danger to the sovereignty of the several States. The Fourteenth Amendment recognizes the sovereignty of the States to protect their citizens' rights of life, liberty, property, and equality. *See, e.g., United States v. Cruikshank*, 92 U.S. 542, 553, 23 L.Ed. 588 (1875) ("[t]he very highest duty of the States" is to protect "[t]he rights of life and personal liberty" and that "[s]overeignty, for this purpose, rests alone with the States"). A federal power under Section 5 to legislate against private interference for the protection of these rights would permit Congress to regulate all of "the rights which one citizen has . . . against another," *id.* at 554-55, and thereby eliminate any role for the States whatsoever. *See, e.g., Civil Rights Cases*, 109 U.S. at 14, 3 S. Ct. 18 ("[I]t is difficult to see where it is to stop. Why may not Congress, with equal show of authority, enact a code of laws for the enforcement and vindication of all rights of life, liberty, and property? . . . [T]he implication of a power to legislate in this manner . . . is repugnant to the Tenth Amendment of the Constitution.").

In sum, the prophylactic cases such as *City of Boerne*, *Morgan*, and *Katzenbach* all address the question of how broadly Congress may legislate when it imposes statutory requirements upon the States pursuant to Section 5. These cases do not address the very distinct question of whether Congress may, under Section 5, regulate purely private conduct at all. The answer to

this latter question has been settled for over a hundred years:

> [W]here a subject is not submitted to the general legislative power of Congress, but is only submitted thereto for the purpose of rendering effective some prohibition against particular State legislation or State action in reference to that subject, the power given is limited by its object, and any legislation by Congress in the matter must necessarily be corrective in its character, adapted to counteract and redress the operation of such prohibited State laws or proceedings of State officers.

Civil Rights Cases, 109 U.S. at 18, 3 S. Ct. 18. To conflate these two lines of cases, and thereby allow a complete disjunction between the constitutional evil to be remedied and the object of Congress' legislation, would be nothing less than to recognize in the Congress itself, contrary to the Constitution, an authority to redefine the scope of the substantive provisions of the Fourteenth Amendment. And as the Supreme Court observed in *City of Boerne*,

> Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the "provisions of [the Fourteenth Amendment]."

City of Boerne, 117 S. Ct. at 2164.

3.

Appellants contend, finally, that, even if not formally overruled, *Harris* and the *Civil Rights Cases* have been repudiated by subsequent authorities and are no longer good law, a contention in support of which appellants rely upon dicta from concurring and dissenting opinions written during the 1960s, a speculative footnote from an opinion in the early 1970s, a passing observation from the Court's decision in *City of Boerne*, and a law review article from 1964. Reply Br. of Appellant Brzonkala at 11 n.13 (arguing that it "overstates the caselaw" to suggest that "those outdated cases remain good law"); *see also* Br. of Appellant Brzonkala at 29, 31; Br. of Intervenor United States at 22 n.11. As appellants themselves must no doubt recognize, none of these authorities is sufficient to draw into question the broad state action holdings of *Harris* and the *Civil Rights Cases*, much less to establish the expansive power in Congress to regulate purely private conduct for which appellants argue.

First, although appellants, and Brzonkala in particular, place considerable weight upon language in the concurring and dissenting opinions in *Guest* to the effect that Section 5 permits Congress to reach purely private conduct, their reliance upon that case—even if as a last resort—is misguided. As we discussed above, the Court in *Guest* could not have been clearer that it was *not* construing the outer limits of Section 5:

> [W]e deal here with issues of statutory construction, not with issues of constitutional power, 383 U.S. at 749, 86 S. Ct. 1170 (citation omitted), [and] *nothing* said in this opinion goes to the question of what kinds of other . . . legislation Congress might constitutionally enact under § 5 of the Fourteenth Amendment to implement that Clause.

Guest, 383 U.S. at 755, 86 S. Ct. 1170 (emphasis added). And, as previously discussed, the holding of the Court in *Guest* was only that the indictment pled enough state involvement in the defendants' conspiracy—active connivance of state officials—to allege a violation of the Equal Protection Clause and therefore sufficient state action to support the indictment under section 241.

Notwithstanding the unambiguous disclaimer by the Court that nothing it said should be read to comment upon the extent of Congress' Section 5 enforcement power, appellants cite two passages from the concurring and dissenting opinions in *Guest* in support of their assertion that Congress may freely regulate purely private behavior when legislating pursuant to the Enforcement Clause of the Fourteenth Amendment. The first such statement is that of Justice Clark, who, joined by Justices Black and Fortas, concurred in the opinion of the Court, but also wrote, inexplicably and without citation or analysis in a single conclusory sentence, that "there now can be no doubt that the specific language of § 5 empowers the Congress to enact laws punishing all conspiracies—with or without state action—that interfere with Fourteenth Amendment rights." *Id.* at 762, 86 S. Ct. 1170 (Clark, J., concurring, joined by Black and Fortas, JJ.). By Justice Clark's own admission, this pronouncement was dictum, unnecessary to any legal conclusion reached by himself and the two Justices who joined his opinion. *See id.* (noting that "[t]he Court carves out of its opinion the question of the power of Congress, under § 5 of the Fourteenth Amendment, to enact legislation implementing . . . the Fourteenth Amendment"); *id.* at 762,

86 S. Ct. 1170 (noting that the construction of the indictment adopted by the Court "clearly avoids the question whether Congress, by appropriate legislation, has the power to punish private conspiracies that interfere with Fourteenth Amendment rights"). In fact, so unnecessary was the statement that Justice Harlan was constrained to remark in a separate opinion that

> [t]he action of three of the Justices who join the Court's opinion in nonetheless cursorily pronouncing themselves on the far-reaching constitutional questions deliberately not reached in [the Court's opinion] seems to me, to say the very least, extraordinary.

Id. at 762 n. 1, 86 S. Ct. 1170 (Harlan, J., concurring in part and dissenting in part).

The second statement, that by Justice Brennan in dissent, although even more unequivocal than Justice Clark's, is no more authority for the assertion that Congress' power under Section 5 reaches purely private conduct. Writing for himself, Chief Justice Warren and Justice Douglas, Justice Brennan, unlike the majority and the three Justices in concurrence, construed the law at issue to protect the right to equal utilization of public facilities from both state *and* private interference. Because of this construction of the statute, Justice Brennan reached the constitutional question expressly not addressed by the majority and unnecessary to the concurrence, and stated, similarly without citation of controlling authority, that he would have held that the statute was constitutional despite its extension to private conduct. *Id.* at 784, 86 S. Ct. 1170 (Brennan, J., concurring in part and dissenting in part, joined by Warren, C.J., and Douglas, J.). As Justice Brennan stated:

> I acknowledge that some of the decisions of this Court, most notably an aspect of the *Civil Rights Cases*, 109 U.S. 3, 11, 3 S. Ct. 18, 27 L.Ed. 835 (1883), have declared that Congress' power under § 5 is confined to the adoption of "appropriate legislation for correcting the effects of prohibited State laws and State acts, and thus to render them effectually null, void, and innocuous." I do not accept—and a majority of the Court today rejects—this interpretation of § 5.

Id. at 782-83, 86 S. Ct. 1170. Justice Brennan's (and Chief Justice Warren's and Justice Douglas') views in dissent, of course, are not binding authority, any more than are Justice Clark's (and Justice Black's and Justice Fortas') in concurrence. Significantly, the Supreme Court, only two years ago, rejected Justice Brennan's equally sweeping companion theory of congressional power under Section 5. *Compare City of Boerne*, 117 S. Ct. at 2168 (expressly repudiating reading of *Katzenbach v. Morgan* that would permit Congress to redefine the substantive guarantees of the Fourteenth Amendment), *with Katzenbach v. Morgan*, 384 U.S. at 654, 86 S. Ct. 1717 (Brennan, J.) (asserting that Congress may be able to redefine the substantive guarantees of the Fourteenth Amendment). And, it goes without saying, the combination of these separately stated views by the concurring and dissenting Justices no more constitutes binding authority overruling *Harris* and the *Civil Rights Cases* than does either of the separate opinions standing alone. *See, e.g., City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 765 n. 9, 108 S. Ct. 2138, 100 L.Ed.2d 771 (1988) (noting that it is the Court's "settled jurisprudence" that "when no single rationale commands a majority, the holding of the

Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds." (internal quotation marks and citation omitted)).

The footnote statement that appears in Justice Brennan's opinion for the Court in *District of Columbia v. Carter*, 409 U.S. 418, 93 S. Ct. 602, 34 L.Ed.2d 613 (1973), in which the Justice states merely that "[t]his is not to say, of course, that Congress may not proscribe purely private conduct under § 5 of the Fourteenth Amendment," *id.* at 424 n. 8, 93 S. Ct. 602, is likewise unavailing for appellants. As the government concedes, this statement, like Justice Clark's in *Guest*, is the purest of dicta, the holding of the Court having been merely that the District of Columbia was not a "State or territory" within the meaning of 42 U.S.C. § 1983 (a holding, incidentally, that has been overruled by statute).[28] And the statement, of course, does not even say that Congress *may* proscribe purely private conduct under Section 5. Moreover, as authority for this *dictum*, Justice Brennan cites *Katzenbach v. Morgan*, *see id.*, in which the Court expressed the view that Congress may redefine the substantive provisions of the Fourteenth Amendment when legislating pursuant to Section 5—a view that, as we have explained, *see*

[28] Acknowledging this statement from *Carter* to be dictum, the government nonetheless urges us "not [to] lightly dismiss[ ]" such dictum because it is the "declaration" of a "20th century" Supreme Court opinion. Reply Br. of Intervenor United States at 6. The implication of the government's argument, of course, is that square holdings from the "19th century"—*i.e.*, those of *Harris* and the *Civil Rights Cases*—may be "lightly dismissed" by a court of appeals. Of course, this is incorrect.

supra at 101-102, has been rejected by the full Supreme Court.

Finally, in support of their contention that *Harris* and the *Civil Rights Cases* are no longer good law, appellants cite the Court's recent observation in *City of Boerne* that

> [a]lthough the specific holdings of [*Harris* and the *Civil Rights Cases*] might have been superseded or modified, *see, e.g., Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 85 S. Ct. 348, 13 L.Ed.2d 258 (1964), *United States v. Guest*, 383 U.S. 745, 86 S. Ct. 1170, 16 L.Ed.2d 239 (1966), their treatment of Congress' § 5 power as corrective or preventative, not definitional, has not been questioned.

City of Boerne, 117 S. Ct. at 2166. Appellants contend that this passing reference draws into doubt the Court's repeated holdings that Congress may not reach purely private conduct pursuant to Section 5.

We do not understand the Supreme Court in *City of Boerne* to have called into question in any way, in dictum or otherwise, its square holdings that Congress may not regulate purely private conduct pursuant to Section 5 of the Fourteenth Amendment. This understanding of the cited passage from *City of Boerne* in particular is confirmed by the overall context of, and subsequent language in, the *City of Boerne* opinion itself. *See, e.g., id.* ("[T]hese early cases['] [including *Harris* and the *Civil Rights Cases*] . . . treatment of Congress' § 5 power as corrective or preventive, not definitional, has not been questioned."); *id.* ("The power to 'legislate generally upon' life, liberty, and property, as opposed to the 'power to provide modes of redress'

against offensive state action, was 'repugnant' to the Constitution." (citation to the *Civil Rights Cases* omitted)).

It is obvious that the Court's reference to the superseding or modification of the *Civil Rights Cases* is only to the fact that, since the *Civil Rights Cases*, the Court has upheld, under different grants of federal power than Section 5, federal civil rights statutes similar to the Civil Rights Act of 1875 invalidated in that case. *See, e.g., Heart of Atlanta*, 379 U.S. at 261, 85 S. Ct. 348 (upholding constitutionality of public accommodations provisions of 1964 Civil Rights Act as exercise of Congress' power under the Commerce Clause); *id.* at 250-52, 85 S. Ct. 348 (discussing *Civil Rights Cases* as "inapposite, and without precedential value in determining the constitutionality" of the public accommodations provisions of the 1964 Civil Rights Act whose applicability was "carefully limited to enterprises having a direct and substantial relation to the interstate flow of goods and people"); *see also supra* Part III.A.1. In other words, although Congress today doubtless has the constitutional power to enact legislation like the invalidated 1875 Civil Rights Act proscribing racial discrimination in public accommodations, it has such power not under Section 5, but rather under the Commerce Clause, Spending Clause, or similar constitutional authority.[29]

[29] Of course, the government can find no solace in these later cases, as we have already considered and rejected its sole attempt to find an alternative constitutional basis for section 13981. *See supra* Part III.

Equally obvious is that the Court's citation of *Guest* in *City of Boerne* refers to the fact that *Guest* and similar cases have extended the concept of state action under the Fourteenth Amendment to include nominally private individuals who act in "active connivance" with the State and state officials. *Guest*, 383 U.S. at 756-57, 86 S. Ct. 1170. That the Court did not intend by this citation to affirm the views of congressional power under Section 5 expressed by the concurring and dissenting opinions in *Guest* is plain from the fact that the Court cited only the majority opinion in *Guest*; it did not cite either the concurring or dissenting opinions, which, as we explained above, are the only opinions in *Guest* that express a view of Congress' power to reach purely private conduct under Section 5.[30]

[30] In the effort to convince us that neither *Harris* nor the *Civil Rights Cases* are any longer sound precedents, the United States and appellant Brzonkala also direct us to a law-review article by Laurent B. Frantz, *Congressional Power To Enforce the Fourteenth Amendment Against Private Acts*, 73 Yale L.J. 1353 (1964). Indeed, in its original brief, the United States cites this journal article twice as often as it cites the Supreme Court's decision in the *Civil Rights Cases*. *See* Br. of Intervenor United States at 22 n.11; *id.* at 23 n. 12 (citing Frantz article, and, in particular, citing the page of that article in which Frantz sets forth his own "subtle" and "complex" reinterpretation of *Harris* and the *Civil Rights Cases*); *see also* Br. of Appellant Brzonkala at 33 n.24 (citing Frantz article). The author of that article does argue that Congress may in some cases regulate private conduct when acting under Section 5, but his conclusion is that "[c]ongressional legislation which impinges directly on the conduct of private individuals *and which operates uniformly regardless of the role played by the state* is unconstitutional." *See* Frantz, *supra*, at 1359 (emphasis in original). Under this interpretation of the Fourteenth Amendment, section 13981 would yet be unconstitutional because it operates uniformly in all States, without regard to the role played by those States in the alleged discriminatory violence. *See supra* Part IV.A.2.

4.

In summary, although appellants expressly contend that *Harris* and the *Civil Rights Cases* are distinguishable, have tacitly been overruled or modified, and have been repudiated by subsequent authorities, it is apparent from the character of each of these arguments and the "authorities" upon which they rely that appellants really have no argument other than that we should *ignore* these decisions because they are "too old" to be controlling. To the point of histrionics, in fact, appellants incant that *Harris* and the *Civil Rights Cases* are simply "outdated," Reply Br. of Appellant Brzonkala at 9, "century-old," Reply Br. of Appellant Brzonkala at 10, from the "1870's [sic] and 1880's," Br. of Intervenor United States at 22 n.11, "19th century" cases, Reply Br. of Intervenor United States at 3, and of little interest to "modern courts," Br. of Appellant Brzonkala at 31, or those with "modern" views about the proper scope of Congress' powers. *Id.* Indeed, the government in its principal brief cites *Harris* and the *Civil Rights Cases* but once, and that citation is a parenthetical embedded within footnote. Br. of Intervenor United States at 22. As we are confident appellants appreciate, however, especially in light of the Supreme Court's recent explicit reliance upon both *Harris* and the *Civil Rights Cases* in *City of Boerne*, we are not at liberty simply to conclude that these cases do not represent the Court's current view of congressional power to regulate exclusively private conduct under Section 5. If *Harris* and the *Civil Rights Cases* are to be overruled, which the present Supreme Court apparently has no inclination to do, such must come from that Court itself. *See, e.g., Rodriguez de Quijas v.*

Shearson/American Express Inc., 490 U.S. 477, 484, 109 S. Ct. 1917, 104 L.Ed.2d 526 (1989).

C.

Given the scope of the Fourteenth Amendment's guarantees as articulated by the Supreme Court and explained above, it is apparent in light of the Supreme Court's recent pronouncement in *City of Boerne* that section 13981 is not "appropriate legislation" to "enforce" those guarantees, because section 13981 is neither sufficiently *aimed* at safeguarding the Equal Protection rights guaranteed by that Amendment nor an appropriate *means* to protect those rights. In fact, as we noted, so crippling to appellants' Section 5 defense of section 13981 is the Court's intervening decision in *City of Boerne*, that both appellants now defend section 13981 primarily under the Commerce Clause, and only secondarily under Section 5, whereas before the panel of this court, immediately after the Court's decision in *Lopez*, they quite understandably defended the statute primarily as an exercise of Congress' Section 5 authority and only secondarily as a valid exercise of Congress' Commerce power under Article I, Section 8.

1.

According to appellants, section 13981 is a legitimate exercise of Congress' Section 5 powers because it is designed and operates to enforce the Equal Protection Clause by remedying sex discrimination in the enforcement of state laws. This argument turns entirely on a congressional finding in a House Conference Report that "bias and discrimination in the criminal justice

system[s of the States] often deprives victims of crimes of violence motivated by gender of equal protection of the laws and the redress to which they are entitled" and that section 13981 is "necessary to guarantee equal protection of the laws." H.R. Conf. Rep. No. 103-711, at 385, *reprinted in* 1994 U.S. Code Cong. & Admin. News at 1853; *see also* S. Rep. No. 103-138, at 55 (asserting that section 13981 "provides a necessary remedy to fill the gaps and rectify the biases of existing State laws"). Appellants insist that this legislative history confirms that Congress enacted section 13981 for the purpose of enforcing the Equal Protection Clause, and that, as long as we can perceive any rational basis for Congress to have enacted section 13981 as a means to that end, we should defer to Congress' considered judgment and uphold the statute. *See, e.g.*, Br. of Appellant Brzonkala at 33 (criticizing district court for "substitut[ing] its own judgment about a suitable remedy" by engaging in means-end analysis of section 13981 and for "*defying* its obligation to defer to Congress' construction of the problem as long as it could perceive a basis upon which the Congress *might* resolve the conflict" (emphasis added and citation omitted)); Br. of Intervenor United States at 26-27 ("Congress itself found evidence of widespread equal protection violations . . . [and] though the district court might have preferred a different remedy, the choice was Congress's to make."); *id.* at 27 ("'It is not for [a court] to review the congressional resolution of these factors. It is enough that [it] be able to perceive a basis upon which the Congress might resolve the conflict as it did.'") (quoting *Katzenbach v. Morgan*, 384 U.S. at 653, 86 S. Ct. 1717). The underlying premise of this argument is that Congress possesses such "exceptionally broad discretion" to legislate pursuant to Section 5, Supp. Br. of Intervenor

United States at 7, and that, at least in practice, it is for Congress to decide whether a statute is "appropriate legislation" to "enforce" the Fourteenth Amendment.

2.

The Supreme Court has made clear, however, that we cannot simply defer to these congressional findings or conclusions; rather, we must arrive at an independent judgment as to the constitutionality of section 13981. As recently as two years ago, in *City of Boerne*, the Court held that the Religious Freedom Restoration Act, a statute Congress had found necessary to enforce the Free Exercise Clause, *City of Boerne*, 117 S. Ct. at 2162 ("Congress relied on its Fourteenth Amendment enforcement power in enacting" the Religious Freedom Restoration Act), was not "appropriate legislation" to "enforce" the rights of religious exercise protected by Section 1 of the Fourteenth Amendment. Congress had enacted the Religious Freedom Restoration Act in response to *Employment Division v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L.Ed.2d 876 (1990), in which the Court held that generally applicable and religion-neutral laws virtually never violate the Free Exercise Clause. The Religious Freedom Restoration Act created a right of religious exercise that was more generous than that right protected by the Constitution because it forbade States from imposing substantial burdens upon religious exercise, even pursuant to generally applicable and religion-neutral laws. *City of Boerne*, 117 S. Ct. at 2162.

By invalidating the Religious Freedom Restoration Act, the Supreme Court in *City of Boerne* reaffirmed the principle that, in order to secure a federal govern-

ment of limited and enumerated powers, *id.*, congressional legislation enacted pursuant to Section 5 must be carefully scrutinized by the courts to ensure that Congress is truly *enforcing* the provisions of the Fourteenth Amendment, rather than *redefining* the substance of those provisions under the guise of enforcement. *Id.* at 2164. Although acknowledging that "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law" is not always "easy to discern," *id.*, the Court emphasized that this distinction "*exists* and *must* be observed," *id.* (emphases added). To this end, the Court declared that a court entertaining a Section 5 challenge can uphold the statute only if there exists a "congruence and proportionality between the [constitutional] injury to be prevented or remedied and the means adopted to that end," *id.*, or, in other words, only if the statute is actually aimed at, and is a closely tailored means of, enforcing a provision of Section 1. The Supreme Court then applied this "congruence and proportionality" test to the Religious Freedom Restoration Act and concluded that the statute exceeded Congress' powers under Section 5, both because it appeared from the Act's legislative history that the statute was aimed at remedying those *constitutionally* permissible burdens imposed upon religion by generally applicable and religion-neutral laws rather than any *unconstitutional* laws that targeted religion, *id.* at 2168-69, and also because the Act's "sweeping coverage" of all state laws regardless of subject matter, level of government, and without any geographic restriction or termination mechanism, was "so out of proportion to a supposed remedial or preventive object" as to betray the nonremedial character of that statute. *Id.* at 2170.

City of Boerne therefore eliminates the fundamental premise of appellants' arguments, namely, that a court cannot independently evaluate Congress' decision that section 13981 is "appropriate legislation" to "enforce" the Equal Protection Clause. Although in support of their contrary premise the parties rely heavily on some exceptionally broad pronouncements of congressional power appearing in *Katzenbach v. Morgan*, 384 U.S. 641, 86 S. Ct. 1717, 16 L.Ed.2d 828 (1966), *see, e.g.*, Br. of Appellant Brzonkala at 27; Br. of Intervenor United States at 21, this broad language has now been repudiated by the Supreme Court in *City of Boerne*, 117 S. Ct. at 2168 (explicitly renouncing language in *Katzenbach v. Morgan* that could be construed to give Congress the power to redefine, as opposed to simply enforce, the provisions of the Fourteenth Amendment); *id.* (emphasizing that under a broad reading of *Katzenbach v. Morgan*, "it is difficult to conceive of a principle that would limit congressional power"); *id.* at 2170 (characterizing *Katzenbach* v. *Morgan* as a case only about "a particular type of voting qualification, one with a long history as a notorious means to deny and abridge voting rights on racial grounds" (internal quotation marks and citation omitted)). *City of Boerne* similarly renders fanciful the government's suggestion that our inquiry into section 13981's validity under Section 5 should mirror our inquiry into the reasonableness of ordinary economic regulation in an economic substantive due process challenge. *See* Br. of Intervenor United States at 26 (quoting economic substantive due process cases including *Williamson v. Lee Optical*, 348 U.S. 483, 75 S. Ct. 461, 99 L.Ed. 563 (1955)).[31]

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[31] The government characterizes as "inexplicable" any suggestion that cases like *Williamson v. Lee Optical* are inapposite in the

Ultimately, *City of Boerne* forcefully affirms that Congress' power under Section 5 is not without limits, and that those limits are not simply theoretical or speculative, but are real and concrete, and are to be enforced by the courts, even at the expense of invalidating laudable and otherwise socially beneficial legislation. *City of Boerne*, 117 S. Ct. at 2163 ("[a]s broad as the congressional enforcement power is, it is not unlimited" (internal quotation marks and citation omitted)); *id.* at 2172 (although "[i]t is for Congress in the *first instance* to determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment," "Congress' discretion is not unlimited . . . and the *courts* retain the power, as they have since *Marbury v. Madison*, to determine if Congress has exceeded its authority under the Constitution" (emphases added)); *id.* ("as the provisions of the federal statute here invoked are beyond congressional author-

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Section 5 context because *Williamson* and other similar cases "were quoted and applied by *Morgan* itself in addressing Congress's § 5 powers." Reply Br. of Intervenor United States at 9. In *Katzenbach v. Morgan*, however, the Supreme Court cited *Williamson* only to respond to the distinct argument that the challenged statute at issue in *Katzenbach v. Morgan* violated individual liberties by "invidious[ly] discriminati[ng]" between American-flag and non-American-flag schools. *Katzenbach v. Morgan*, 384 U.S. at 656-57, 86 S. Ct. 1717. It did not, contrary to the government's representation, cite *Williamson* "in addressing Congress's § 5 powers." Reply Br. of Intervenor United States at 9. In any event, and as our above discussion makes clear, even if the Supreme Court had so cited *Williamson* in *Katzenbach v. Morgan*, the Supreme Court more recently, in *City of Boerne*, repudiated any language in *Katzenbach v. Morgan* that could be interpreted to mean that Congress' Section 5 power is as broad as a State's power to enact ordinary economic regulations of the type upheld in *Williamson*.

ity, it is this Court's precedent, not [the Religious Freedom Restoration Act], which must control"); *see also Civil Rights Cases*, 109 U.S. at 10, 3 S. Ct. 18 ("the responsibility of an independent judgment is now thrown upon this court; and we are bound to exercise it according to the best lights we have").

3.

Application of the principles set forth in *City of Boerne* to section 13981 reveals that section 13981 clearly represents an illegitimate exercise of Section 5 authority, because it is neither aimed at violations of the Equal Protection Clause nor a closely tailored means of correcting any such violations.

(a)

First, it is clear under *City of Boerne* that we cannot simply defer wholesale to Congress' purely legal conclusion that "bias and discrimination in the criminal justice system[s of the States] often deprives victims of crimes of violence motivated by gender of equal protection of the laws and the redress to which they are entitled." H.R. Conf. Rep. No. 103-711, at 385, *reprinted in* 1994 U.S. Code Cong. & Admin. News at 1853; *see also* S. Rep. No. 103-138, at 55 ("the criminal justice system is not providing equal protection of the laws of women in the classic sense") (quoting Prof. Cass Sunstein). Indeed, as a legal conclusion, this particular finding may be worthy of little, if any, deference. The finding is an essentially verbatim recitation of the congressional testimony of a single law professor, and it was added to the legislative history only after that law professor testified that such a "finding" would be in-

strumental in defending the constitutionality of section 13981 under Section 5.[32] This finding thus appears to be less a considered congressional judgment as to the constitutionality of section 13981 than legal boiler plate belatedly appended to the House Conference Report in an effort to insulate section 13981 from judicial review. Moreover, even if this finding did represent a considered congressional judgment as to the constitutional-

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[32] *Compare* 137 Cong. Rec. S579, S608 (1991) (text of S. 15, 102d Cong. § 301(a) (1991)) (earlier version of section 13981 cause of action for damages, which recited no findings of state bias or discrimination in the enforcement or application of state laws), *and Crimes of Violence Motivated by Gender: Hearing Before the Subcomm. on Civil and Const. Rights of the House Comm. on the Judiciary*, 103d Cong., 1st Sess. 52(1993) (statement of Prof. Sunstein) (testimony recommending that Congress amend S.15 as follows: "In particular, Title III [section 13981] might include provisions that . . . emphasize the existence of current bias or discrimination in the criminal justice system—bias or discrimination that, Congress believes, in many cases deprives women subject to violent crime of the equal protection of the laws."), *with* H.R. Conf. Rep. No.103-711, at 385, *reprinted in* 1994 U.S. Code Cong. & Admin. News at 1853 (finding that "bias and discrimination in the criminal justice system often deprives victims of crimes of violence motivated by gender of equal protection of the laws and the redress to which they are entitled"). Interestingly, the earlier version of section 13981, included within S. 15, appears to ground the constitutionality of section 13981's damages cause of action not in the Equal Protection Clause at all, but rather in the Privileges and Immunities Clause of the Fourteenth Amendment. 137 Cong. Rec. at S608 (Title III, § 301(b)) ("All persons within the United States shall have the same rights, privileges and immunities in every State as is enjoyed by all other persons to be free from crimes of violence motivated by the victim's gender"). Presumably, the Privileges and Immunities rationale was abandoned by Congress because it was without merit. *See, e.g., Slaughter-House Cases*, 16 Wall. 36, 74-80, 21 L.Ed. 394 (1872).

ity of section 13981, the soundness of that judgment is drawn into question by the fact that Congress also "found"—contrary to Supreme Court precedent applying the Equal Protection Clause only to state action—that purely private acts of violence against women also "threaten women's equal protection of the laws." S. Rep. No. 103-138, at 55. Therefore, instead of deferring wholesale to Congress' conclusion that section 13981 is aimed at, and a remedy for, violations of Equal Protection, we must examine the legislative history and structure of section 13981 to determine the basis of Congress' conclusion.

The legislative history of section 13981, like that of the Religious Freedom Restoration Act invalidated in *City of Boerne*, reveals that section 13981 was not enacted as a remedy for action that violates, or may violate, the Constitution. Although this legislative history does establish that the States enforce and apply certain laws in a manner that may ultimately prevent the victims of gender-motivated violence from obtaining vindication through the criminal or civil systems, the portions of the legislative history cited by appellants do not demonstrate that Congress "[was] concern[ed]," *City of Boerne*, 117 S. Ct. at 2169, with the type of *purposeful* discrimination against women in the enforcement of facially neutral laws that could give rise to an equal protection violation. *Personnel Adm'r. v. Feeney*, 442 U.S. 256, 99 S. Ct. 2282, 60 L.Ed.2d 870 (1979) (holding that Equal Protection Clause sex-discrimination challenge to facially neutral law must fail without a showing of purposeful discrimination); *cf. Washington v. Davis*, 426 U.S. 229, 96 S. Ct. 2040, 48 L.Ed.2d 597 (1976); *Village of Arlington Heights v.*

Metropolitan Hous. Corp., 429 U.S. 252, 97 S. Ct. 555, 50 L.Ed.2d 450 (1977).

Although appellants are doubtless correct that the legislative history of the Violence Against Women Act—a statute that includes but is not limited to section 13981—comprises an impressive array of reports and hearings detailing the scope of the problem of violence against women, these extensive findings are, in the final analysis, of little value in the Section 5 inquiry. Many of them do not relate to burdens imposed by state action, *see* , e.g, S. Rep. No. 102-197, at 46 ("Even if we could eradicate these legal rules and practices tomorrow, it is unlikely that prosecution and reporting rates for rape would increase."); *Women and Violence: Hearing Before the Comm. of the Judiciary, United States Senate*, 101st Cong., 2d Sess. 39, 44 (1990) (noting low percentage of recoveries in civil rape cases due to impecunious defendants). And, most importantly, even if we were to concede that the legislative history detailed state discrimination of some sort, the record recites few, if any, specific findings that the States are engaging in *unconstitutional* discrimination against women in the enforcement or application of their criminal and civil laws. *See* H.R. Conf. Rep. No. 103-711, at 385-86, *reprinted in* 1994 U.S. Code Cong. & Admin. News at 1853-54 (discussing findings without any mention of purposeful discrimination); S. Rep. No. 103-138, at 54-55 (discussing basis for enacting section 13981 under Section 5 without any mention of purposeful discrimination). Furthermore, although the legislative history also discusses some specific features of state laws that need reform, neither appellant has cited any portion of this massive legislative history indicating that the failure of the States to adopt such

reforms is the result of purposeful and unconstitutional discrimination against women. *See*, *e.g.*, S. Rep. No. 101-545, at 31-33; S. Rep. No. 102-197, at 45-46. This legislative record is therefore quite unlike that before the Court in *South Carolina v. Katzenbach*, in which there was voluminous evidence that the provisions of the challenged Voting Rights Act were designed to remedy purposeful discrimination or otherwise unconstitutional deprivations of voting rights. *South Carolina v. Katzenbach*, 383 U.S. at 308, 309-315, 329-30, 86 S. Ct. 803 (detailing a century of racially discriminatory deprivations of the right to vote in certain southern States). In fact, section 13981's legislative record is almost perfectly analogous to the record found to be deficient by the Supreme Court in *City of Boerne*, which recited little, if any, evidence that Congress enacted the Religious Freedom Restoration Act out of concern with purposeful or unconstitutional discrimination against religion by the States. *Cf. City of Boerne*, 117 S. Ct. at 2169 ("Congress' concern [in enacting the Religious Freedom Restoration Act] was with the incidental burdens imposed, not the object or purpose of the legislation.").

If anything, the hearings and reports on section 13981 bear out that the States and state law enforcement officials are *not* purposefully discriminating against women in the enforcement of laws against gender-motivated crimes of violence, but rather that they have undertaken the "most fervent," S.Rep. No. 102-197, at 39, and "sincere efforts . . . to assist . . . victims of rape and domestic violence," S. Rep. No. 101-545, at 33, and that *despite* such efforts, "subtle prejudices" and "stereotypes," S. Rep. No. 102-197, at 39, among society at large continue to prevent women from

filing criminal complaints, bringing suit, and otherwise obtaining vindication through the legal system. *See, e.g.*, S. Rep. No. 101-545, at 33 (attributing low prosecution and conviction rates of gender-motivated violent crime against women, in part, to "the press and society"); S. Rep. No. 102-197, at 39-46; *cf. Violent Crimes Against Women: Hearing Before the Comm. on the Judiciary, United States Senate*, 103d Cong., 1st Sess. 25 (1993) (noting that every State in the union has adopted legislation authorizing protective orders for victims of domestic violence, and use of such orders has increased dramatically); *Domestic Violence—Not Just A Family Matter: Hearing Before the Subcomm. on Crime and Criminal Justice of the Comm. on the Judiciary, House of Representatives*, 103d Cong., 2d Sess. 131 (1994) (results of Attorneys General survey that "[t]hroughout the country, Attorneys General have developed innovative projects to prevent domestic violence" and "have produced a number of excellent resources to prevent sexual violence in their States"); *Violence Against Women—Fighting the Fear: Hearings Before the Comm. on the Judiciary, United States Senate*, 103d Cong., 1st Sess. 42-43 (1993) (noting "a spirit and commitment" in the States to address problem of violent crime against women). The legislative history thus clearly demonstrates that the aim of section 13981 was not so much to redress violations of Equal Protection, but rather to send a national signal about the harms of violence against women. *See, e.g.*, S. Rep. No. 103-138, at 50 (Section 13981 "has the entirely different function [from state tort law] of providing a special societal judgment that crimes motivated by gender bias are unacceptable because they violate the victims' civil rights.").

The structure of section 13981 and other provisions of the VAWA further confirm the lack of congruence between the statute and its asserted aim of addressing purposefully unequal law enforcement by the States. Most telling, of course, is the fact that section 13981 directly regulates only private individuals who commit acts of violence and subjects those individuals to liability for the harms resulting from that violence. That is, the statute does not regulate the actions of the States or any other action taken under color of state law, much less *remedy* or *correct* the States' discriminatory enforcement or application of their laws. For example, if a State consistently refuses to prosecute rapists because of its gender animus against their female victims, the victim's ability to obtain some small measure of justice through federal damages suits against the rapist would hardly eliminate or correct the State's constitutional violations. *See, e.g., City of Boerne*, 117 S. Ct. at 2170 ("Remedial legislation under § 5 'should be adapted to the mischief and wrong which the [Fourteenth][A]mendment was intended to provide against.'") (quoting *Civil Rights Cases*, 109 U.S. at 13, 3 S. Ct. 18). That section 13981 provides a remedy only against private individuals who commit violent crimes is significant, and perhaps dispositive, evidence that section 13981 does not truly aim at correcting unequal and unconstitutional enforcement of the laws by the States, but aims instead only to remedy or deter the underlying acts of violence to which that liability attaches.

Other features of the statute likewise belie the suggestion that section 13981 is designed to remedy purposeful discrimination against women by the States. For example, section 13981 vests the state courts with

concurrent jurisdiction over section 13981 claims. 42 U.S.C. § 13981(e)(3). This mandatory concurrent jurisdiction provision is hard to square with the asserted rationale that section 13981 was designed to remedy unconstitutional state discrimination. If Congress were truly concerned that state courts, judges, and juries were hostile to women and purposefully discriminating against them in the enforcement and application of law, the more natural response would have been to create exclusive federal jurisdiction over section 13981 claims, or, at the very least, only to allow concurrent jurisdiction in state courts that Congress concluded were not purposefully discriminating against women. Section 13981 instead permits its authorized causes of action to be brought in the very fora that the appellants must contend are hostile to the interests of women.[33] Indeed, section 13981 does not merely permit claims to be brought in state court; it may actually *channel* section 13981 claims into state court. Most notably, for example, section 13981(e)(4) forbids federal courts entertaining claims brought under section 13981(c) from exercising supplemental jurisdiction over "divorce, alimony, equitable distribution of marital property, or child custody decree" cases. Thus, plaintiffs who wish

[33] More evidence of the nonremedial character of section 13981 is the fact that there is virtually nothing in the record cited by the parties to prove that federal courts, federal judges, or federal juries are significantly less susceptible to the subtle prejudices and stereotypes that often prevent women from obtaining recovery in civil actions against the perpetrators of gender-motivated violence than are their counterparts in the state judicial systems. *See also* Br. of Appellees Morrison and Crawford at 34 n.13 (citing scholarly commentary and studies that the federal court systems are prone to the identical types of gender-bias that exist in state court systems).

to bring *both* section 13981 claims *and* divorce or child-custody actions against their spouses—a class of plaintiff very likely to have suffered the most egregious forms of gender-motivated domestic violence or marital rape—will either be forced to prosecute two separate actions in different legal fora at greater cost, or else bring all of their claims in state court.

The conclusion that Congress did not design section 13981 as a remedy for purposeful discrimination against women by hostile state courts is also borne out by features of the VAWA whose constitutionality is not at issue here. For example, in addition to creating a private cause of action, other provisions of the VAWA appropriated approximately $1.6 billion in federal funds, subject to enhancement, to help the States eliminate the causes and effects of rape and domestic violence. 42 U.S.C. § 3796gg (law enforcement); *id.* § 300w-10 (education and prevention programs); *id.* § 10402(a) (battered women's shelters). Such a generous subsidy to the state governments casts serious doubt upon any suggestion that the Congress that enacted section 13981 was truly concerned with purposeful and unconstitutional deprivations of Equal Protection rights at the hands of hostile state governments.

In sum, the combined effect of the legislative history, the structure of section 13981, and the other provisions of VAWA is to disprove any contention that section 13981 was actually aimed at purposeful acts of unconstitutional sex discrimination. *Cf. City of Boerne*, 117 S. Ct. at 2170 ("Preventive measures prohibiting certain types of laws may be appropriate when there is reason to believe that many of the laws affected by the con-

gressional enactment have a *significant likelihood* of being unconstitutional." (emphasis added)). To the contrary, these materials establish that Congress' true concerns in enacting VAWA were to deter or remedy individual and private acts of violence and to raise public consciousness about the seriousness of violent crimes against women by sending a national signal of opposition to this class of violent crime. Although these are unquestionably worthy public policy goals, they are not sufficient in and of themselves to render section 13981 a legitimate exercise of Congress' power under Section 5 of the Fourteenth Amendment.

(b)

Even if section 13981 were intended as a means to remedy unconstitutional discrimination by the States, it, much like the provisions of the Religious Freedom Restoration Act invalidated in *City of Boerne*, is so out of proportion to any possible unconstitutional state action at which it might conceivably be aimed as to exceed congressional power to "enforce" the Fourteenth Amendment. Liability under section 13981 attaches to all felonious acts of violent crime motivated by gender, 42 U.S.C. § 13981(c), and the provision creates a statutory right and a cause of action to enforce that right for all persons in the United States who suffer from such violent crime. *Id.* § 13981(b) (conferring upon "[a]ll persons within the United States" the statutory right to be free from gender-based crimes); *id.* § 13981(c) (creating cause of action for the same). This sweeping coverage is in no way tailored to the asserted ends of equal enforcement of the laws. For example, under section 13981, liability attaches to all gender-motivated crimes whether committed by private individuals acting alone, or by those acting under color of state law. *Id.* (liability extends to a person "including a person who acts under color of" state law (emphasis added)). Liability also attaches to any criminal act, whether or not the plaintiff filed a criminal complaint in the state criminal justice system, and without regard to whether the State failed adequately to investigate or prosecute the case because of bias or discrimination. *Id.* § 13981(d)(2)(A) (cause of action may lie without regard to whether the predicate acts of violence "have actually resulted in criminal charges, prosecution, or conviction"); *id.* § 13981(e)(2) ("Nothing in this section requires a prior criminal complaint, prosecution, or conviction to establish the elements of a cause of action."). Section 13981 applies equally in all jurisdictions, whether those jurisdictions evidence a pattern of chronic under-enforcement of laws prohibiting rape and domestic violence, S. Rep. No. 102-197, at 45-46, or whether those jurisdictions are the States or metropolitan areas Congress applauded for strengthening the enforcement of their rape and sexual assault laws, S. Rep. No. 101-545, at 33. Also, although Brzonkala and the government attempt to defend section 13981 as a remedy for inequalities caused by certain States that either immunize spousal rape or that have failed to adopt rape shield evidentiary rules, section 13981 does not exempt from its coverage those forty-seven States that at the time of section 13981's adoption did criminalize spousal rape, S. Rep. No. 102-197, at 45 & n.50, or those States that have adopted rape shield laws in civil cases. In addition, like the sweeping provisions of the Religious Freedom Restoration Act invalidated in *City of Boerne*, 117 S. Ct. at 2170, and unlike the provisions upheld in *City of Rome*, 446 U.S. at 177, 100 S. Ct. 1548, and *South Carolina v.*

Katzenbach, 383 U.S. at 331-32, 86 S. Ct. 803, section 13981 contains no termination date or termination mechanism. And, finally, section 13981 is written in gender-neutral terms and would presumably create a cause of action for a *male* plaintiff, even though there is no evidence, or even any suggestion, that the States have unconstitutionally enforced their laws that disproportionately affect men. *See* S. Rep. No. 102-197, at 43 (citing state gender bias task force conclusions that "crimes disproportionately affecting women are often treated less seriously than comparable crimes against men"); *cf.* Br. of Appellant Brzonkala at 26 n.12 ("While [section 13981] is gender-neutral, Congress recognized that women overwhelmingly are the victims of gender-motivated violence. . . . Consequently, this brief refers throughout to gender-motivated violence against women.").

In short, section 13981's "sweeping coverage," *City of Boerne*, 117 S. Ct. at 2170, reaches all victims of gender-motivated violent felonies, all defendants who commit such crimes, all States and jurisdictions without regard to the adequacy of their enforcement efforts, substantive laws, or evidentiary rules and procedures, and does so without any time limit or termination mechanism. *See id.* (distinguishing sweeping coverage of the Religious Freedom Restoration Act from other relatively more narrow and measured federal statutes that the Supreme Court had previously upheld as valid exercises of congressional enforcement powers under the Enforcement Clauses of the Fourteenth and Fifteenth Amendments); *cf. South Carolina v. Katzenbach*, 383 U.S. at 315, 331, 86 S. Ct. 803 (upholding provisions of federal statute that were confined to certain regions of the country where voting discrimination had been most flagrant, that affected a discrete class of state voting laws, and that contained a five year termination mechanism); *Katzenbach v. Morgan*, 384 U.S. at 641, 86 S. Ct. 1717 (similar); *Mitchell*, 400 U.S. at 112, 91 S. Ct. 260 (upholding provisions of federal statute that prohibited States from imposing a particular type of voting qualification with a long history of racially discriminatory use); *City of Rome*, 446 U.S. at 177, 100 S. Ct. 1548 (upholding federal statute that applied to state "jurisdictions with a demonstrable history of intentional racial discrimination" deemed to "create the risk of purposeful discrimination"). Therefore, even assuming that section 13981 were truly intended or designed as a means to remedy state discrimination, the remedy created by the section is so clearly out of proportion to any suggested unequal treatment as to be an illegitimate means of enforcement of the Equal Protection Clause. *Cf. City of Boerne*, 117 S. Ct. at 2171 ("The substantial costs [the Religious Freedom Restoration Act] exacts, both in practical terms of imposing a heavy litigation burden on the States and in terms of curtailing their traditional general regulatory power, far exceed any pattern or practice of unconstitutional conduct. . . .").

(c)

The Supreme Court concluded its Section 5 analysis in *City of Boerne* by observing that, if it were to uphold the Religious Freedom Restoration Act as an appropriate exercise of Section 5, such would "contradict[] vital principles necessary to maintain separation of powers and the federal balance," *id.* at 2172, namely, that the federal government not be accorded a general police power but rather be confined to its limited and

enumerated powers, *id.* at 2162 ("Under our Constitution, the Federal Government is one of enumerated powers."); *id.* (citing *The Federalist* No. 45). Or, as Justice Kennedy explained in the analogous context of construing 42 U.S.C. § 1985(3), "*essential* considerations of federalism are at stake here. The federal balance is a *fragile* one, and a false step in interpreting § 1985(3) risks making a whole catalog of ordinary State crimes a concurrent violation of a single congressional statute. . . ." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 287, 113 S. Ct. 753, 122 L.Ed.2d 34 (1993) (Kennedy, J., concurring) (emphases added). We are convinced that we would disrupt the "vital" "federal balance," and essentially confer upon Congress a general police power, were we to hold that section 13981 is a legitimate exercise of congressional remedial power under Section 5.

If the congressional findings cited here suffice to render section 13981 a legitimate enforcement of the Fourteenth Amendment, then in effect the federal government could constitutionally regulate every aspect of society, even including those areas traditionally thought to be reserved exclusively to the several States, such as general criminal and domestic relations law. *See supra* Part III.C. For example, if section 13981 were an appropriate means to remedy gender-motivated bias in the States, then the federal government could similarly adopt a general federal criminal code to replicate or preempt the existing criminal laws of the fifty States in order to root out any such bias. Presumably, the very same or similar legislative record of section 13981 could support an analogous finding that all state criminal laws are infused with gender bias. *See, e.g.*, S. Rep. No. 102-197, at 44 ("gender bias

permeates the court system and . . . women are most often its victims" (internal quotation omitted)). And many of the same state gender-bias task forces that were cited in section 13981's legislative history also appear to find gender bias in state domestic-relations law. *Compare* Br. of Appellees Morrison and Crawford at 33 n.12 (citing various state task force conclusions of gender bias in domestic relations law), *with* S. Rep. No. 102-197, at 43 n. 40, and S. Rep. No. 103-138, at 49 n.52 (citing these and other task forces' conclusions on gender bias in state criminal systems). Thus, if section 13981 were constitutional under Section 5, then presumably the federal government could adopt and enforce a federal divorce and domestic relations code. And federal preemption, or even occupation, of other substantive fields of law, such as tort and contract law, would soon follow. *See, e.g.*, Br. of Appellees Morrison and Crawford at 33-34 (citing various law review articles and studies in support of argument that gender bias pervades tort law, contract law, and several other substantive areas of State law). Because the logic of appellants' argument would not be limitable to the Equal Protection Clause, the federal government presumably would even be permitted to create a national burglary statute in order to protect from private interference the Fourteenth Amendment's guarantee that "[n]o State" "deprive any person of life, liberty, or *property*, without due process of law." Indeed, we think it no overstatement that such an interpretation of Section 5 would, in a way "repugnant" to the Constitution, *City of Boerne*, 117 S. Ct. at 2166 (quoting the *Civil Rights Cases*, 109 U.S. at 15, 3 S. Ct. 18), permit Congress, upon but a generalized finding of bias, to occupy the entire field of state law and to legislate

directly upon all of the rights of life, liberty, and property of all the citizens of the United States.

We cannot conclude, therefore, that section 13981 is a valid exercise of Congress' authority under Section 5 of the Fourteenth Amendment.

V.

At the end of the day, it is apparent that, for objectives unquestionably laudable, Congress has sought, through its powers to enforce the Constitution's prohibitions against state deprivations of equal protection and to regulate commerce among the several States, to direct private individuals in their activities wholly local and noneconomic. It has sought to reach conduct quintessentially within the exclusive purview of the States through legislation that neither conditions the federal intervention upon proof of misconduct imputable to a State or upon a nexus to interstate commerce, nor is tailored so as to address activity closely connected with constitutional failures of the States or with interstate commerce. This the Congress may not do, even in pursuit of the most noble of causes, lest be ceded to the Legislature a plenary power over every aspect of human affairs—no matter how private, no matter how local, no matter how remote from commerce.

Appellants have labored to defend such an unprecedented power in the Congress first, in the immediate aftermath of *United States v. Lopez*, as a valid exercise of Congress' indisputably broad Fourteenth Amendment power under Section 5, then, after *City of Boerne v. Flores*, as a valid exercise of Congress' equally broad

power under Article I, section 8, and, finally, counter currently, as legislation that should usher in a new era not of congressional restraint, but of congressional expansion into the affairs of the States and of the People. Ultimately, however, certain of section 13981's constitutionality but uncertain of the reason, and recognizing that we are without authority to deviate from binding Supreme Court precedent, they have been left with little more than the sincerest of assertions that section 13981 is laudable social policy. While this is undoubtedly true—no one favoring violence against women—the desirability of section 13981 is, as it must be under a Constitution that separates the powers one from the other, a matter that has been placed beyond our cognizance by the Constitution we interpret.

We are not unaware that in invalidating section 13981 today, we invalidate a provision of a statute denominated the "Violence Against Women Act." No less for judges than for politicians is the temptation to affirm any statute so decorously titled. We live in a time when the lines between law and politics have been purposefully blurred to serve the ends of the latter. And, when we, as courts, have not participated in this most perniciously machiavellian of enterprises ourselves, we have acquiesced in it by others, allowing opinions of law to be dismissed as but pronouncements of personal agreement or disagreement. The judicial decision making contemplated by the Constitution, however, unlike at least the politics of the moment, emphatically is not a function of labels. If it were, the Supreme Court assuredly would not have struck down the "Gun-Free School Zones Act," the "Religious Freedom Restoration Act," the "Civil Rights Act of 1871," or the "Civil Rights Act of 1875." And if it ever be-

comes such, we will have ceased to be a society of law, and all the codification of freedom in the world will be to little avail.

Accordingly, the Congress having exceeded its constitutional authority in enacting Subtitle C of the Violence Against Women Act, the judgment of the district court dismissing plaintiff-appellant Brzonkala's claims under 42 U.S.C. § 13981 is affirmed.

AFFIRMED.

WILKINSON, Chief Judge, concurring:

As this century draws to a close, it seems appropriate to examine the course of its jurisprudence and the place of this case within it. The decision before us is an especially difficult one because it pits the obligation to preserve the values of our federal system against the imperative of judicial restraint.

I agree that section 13981 of the Violence Against Women Act exceeds the authority of Congress under both the Commerce Clause and Section 5 of the Fourteenth Amendment. Our ruling reaffirms the fundamental principle that our national government is one of enumerated—and therefore limited—powers. *See, e.g., United States v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624, 131 L.Ed.2d 626 (1995).

Nonetheless, it is a grave judicial act to nullify a product of the democratic process. The hard question is whether our decision constitutes an indefensible example of contemporary judicial activism or a legitimate exercise in constitutional interpretation. Respect for

the institutions of self-government requires us, in all but the rarest of cases, to defer to the actions of legislative bodies. In particular, "[t]he history of the judicial struggle to interpret the Commerce Clause . . . counsels great restraint before [we] determine[ ] that the Clause is insufficient to support an exercise of the national power." *Lopez*, 514 U.S. at 568, 115 S. Ct. 1624 (Kennedy, J., concurring). I would add to that cautionary tale not only the judiciary's parallel experience with economic due process but also the activist legacy of the Warren and early Burger Courts. By considering today's decision in light of history's often cold assessment of the product of those prior eras, we may ascertain whether we forsake to our peril the high ground of judicial restraint.

I.

A.

Judicial activism in this century falls into three general stages. The first, beginning roughly with the decision in *Lochner v. New York*, 198 U.S. 45, 25 S. Ct. 539, 49 L.Ed. 937 (1905), and continuing through the early New Deal, has come to symbolize judicial activism taken to excess. The *Lochner* decision remains the foremost reproach to the activist impulse in federal judges. And the *Lochner* era is still widely disparaged for its mobilization of personal judicial preference in opposition to state and federal social welfare legislation. In a series of decisions, the Supreme Court pressed the doctrine of "liberty of contract" against state and federal laws protecting union members, *see Coppage v. Kansas*, 236 U.S. 1, 35 S. Ct. 240, 59 L.Ed. 441 (1915); *Adair v. United States*, 208 U.S. 161, 28 S. Ct. 277, 52

L.Ed. 436 (1908), and laws prescribing minimum wages for women and children, *see Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587, 56 S. Ct. 918, 80 L.Ed. 1347 (1936); *Adkins v. Children's Hospital*, 261 U.S. 525, 43 S. Ct. 394, 67 L.Ed. 785 (1923). Even though the Court during the same period upheld several maximum-hours provisions, *see Bunting v. Oregon*, 243 U.S. 426, 37 S. Ct. 435, 61 L.Ed. 830 (1917); *Muller v. Oregon*, 208 U.S. 412, 28 S. Ct. 324, 52 L.Ed. 551 (1908); *Holden v. Hardy*, 169 U.S. 366, 18 S. Ct. 383, 42 L.Ed. 780 (1898), as well as other labor legislation, *see, e.g., Chicago, B. & Q. R.R. Co. v. McGuire*, 219 U.S. 549, 31 S. Ct. 259, 55 L.Ed. 328 (1911), contemporary critics assailed the Court for indulging its "judicial sense of what was good for the business community" and ignoring the plight of the common citizen. Robert H. Jackson, *The Struggle for Judicial Supremacy* 164 (1941); *see also Morehead*, 298 U.S. at 619, 56 S. Ct. 918 (Hughes, C.J., dissenting). The irreconcilability of such cases as *Lochner* and *Adkins* on one side and *Holden* and *Bunting* on the other fostered the impression of a Court that was picking and choosing without principle, on occasion voiding legislative acts "simply because they [were] passed to carry out economic views which the Court believe[d] to be unwise or unsound," *Adkins*, 261 U.S. at 562, 43 S. Ct. 394 (Taft, C.J., dissenting).

Then, as now, the scope of the commerce power was a major battleground. The New Deal Court used the Commerce Clause to rein in the expanding scope of federal economic legislation. These cases protected the authority of the states vis-a-vis the federal government, rather than restricting government action entirely. Nonetheless, doctrinal inconsistency again lent fuel to those who charged the Supreme Court with favoring

the corporate class. *Compare Hammer v. Dagenhart*, 247 U.S. 251, 38 S. Ct. 529, 62 L.Ed. 1101 (1918) (Congress may not bar goods made with child labor from the channels of interstate commerce), *with, e.g., Hoke v. United States*, 227 U.S. 308, 33 S. Ct. 281, 57 L.Ed. 523 (1913) (Congress may keep channels of commerce free of transportation for prostitution). These results suggested to many that the Court's line-drawing was not truly constitutional, but that it simply reflected opposition to "[t]he fundamental consideration . . . that industry should take care of its human wastage." *Railroad Retirement Bd. v. Alton R.R. Co.*, 295 U.S. 330, 384, 55 S. Ct. 758, 79 L.Ed. 1468 (1935) (Hughes, C.J., dissenting).

Moreover, the shadows cast by such aggressive Commerce Clause decisions as *Carter v. Carter Coal Co.*, 298 U.S. 238, 56 S. Ct. 855, 80 L.Ed. 1160 (1936) (striking the Bituminous Coal Conservation Act of 1935), *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 55 S. Ct. 837, 79 L.Ed. 1570 (1935) (striking the National Industrial Recovery Act as applied), and *Alton Railroad Co.*, 295 U.S. 330, 55 S. Ct. 758, 79 L.Ed. 1468 (striking the Railroad Retirement Act), obscured earlier cases in which the Court upheld expansive federal regulation, *see , e.g., Texas & N.O.R.R. Co. v. Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548, 50 S. Ct. 427, 74 L.Ed. 1034 (1930) (Railway Labor Act); *Stafford v. Wallace*, 258 U.S. 495, 42 S. Ct. 397, 66 L.Ed. 735 (1922) (Packers and Stockyards Act); *Southern Ry. Co. v. United States*, 222 U.S. 20, 32 S. Ct. 2, 56 L.Ed. 72 (1911) (Safety Appliance Act). Narrow interpretations of the taxing and spending powers in *United States v. Butler*, 297 U.S. 1, 56 S. Ct. 312, 80 L.Ed. 477 (1936) (striking provisions of the Agricultural Adjustment

Act), and the *Child Labor Tax Case*, 259 U.S. 20, 42 S. Ct. 449, 66 L.Ed. 817 (1922) (striking the Child Labor Tax Law), solidified the image of an obstructionist Supreme Court, determined to impede legislative efforts to reverse the era's economic dysfunction and to ease the human suffering that it had wrought.

The century's first era of judicial activism proved a painful experience for the courts, as well as for the nation. Battered by court packing proposals and chastened by a wholesale change in personnel, the Court eventually abandoned the business of reviewing state and federal regulation of economic activity. *See, e.g., Wickard v. Filburn*, 317 U.S. 111, 129, 63 S. Ct. 82, 87 L.Ed. 122 (1942); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 57 S. Ct. 578, 81 L.Ed. 703 (1937). Indeed, the reaction to the Court's early excesses was so strong that many supposed for a time that limits on the commerce power had become non-existent. *See, e.g.*, Gerald Gunther & Kathleen M. Sullivan, *Constitutional Law* 198 (13th ed. 1997) ("In the wake of Wickard . . . it was difficult indeed to articulate *any* limits on the reach of the commerce power."). And the *Lochner* specter of result-oriented activism still haunts the Court's debates today. *See Lopez*, 514 U.S. at 608, 115 S. Ct. 1624 (Souter, J., dissenting) ("[I]t seems fair to ask whether the step taken by the Court today does anything but portend a return to the untenable jurisprudence from which the Court extricated itself almost 60 years ago.").

B.

The century's second era of judicial activism was more social than economic in nature. The post-war civil rights movement pursued a strategy of litigation to correct the abuses blacks suffered in every aspect of

their civic experience. Seeking to emulate the movement's success, more and more citizens turned to the courts to vindicate a wide variety of individual liberties. Unlike the first era, which sought at least in part to protect the states against the encroachments of the federal legislature, the cases of this second era uniformly restricted the states' authority. The Court accomplished this in two ways. In some cases it incorporated the Bill of Rights against the states through the Fourteenth Amendment's Due Process Clause. *See, e.g., Malloy v. Hogan*, 378 U.S. 1, 84 S. Ct. 1489, 12 L.Ed.2d 653 (1964). In other instances it formulated new rights from the Bill of Rights, *see, e.g., Escobedo v. Illinois*, 378 U.S. 478, 84 S. Ct. 1758, 12 L.Ed.2d 977 (1964), and the Fourteenth Amendment, *see, e.g., Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L.Ed.2d 147 (1973).

The verdict on this second activist era has been more mixed than the verdict on the first. Four of the most widely accepted decisions of the era imposed broad restrictions on the states. *See Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362, 12 L.Ed.2d 506 (1964) (requiring states to apportion their legislatures according to population); *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L.Ed.2d 686 (1964) (requiring states to recognize malice as an element of libel actions); *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L.Ed.2d 799 (1963) (requiring states to furnish legal representation in criminal cases); *Brown v. Board of Educ.*, 347 U.S. 483, 74 S. Ct. 686, 98 L.Ed. 873 (1954) (requiring states to end public school segregation). Unlike the most notable decisions of the first activist era, these four opinions have become judicial landmarks, and their position in the pantheon of our jurisprudence is secure.

In many contexts, however, the institutional stresses brought on by the era's most expansive and entangling decisions forced the Court to reverse course. Some decisions overextended the institutional capacity of the federal courts, installing judges as long-term supervisors of basic state functions. After approving district courts' broad equitable discretion to devise wide-ranging school desegregation plans, *see Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 91 S. Ct. 1267, 28 L.Ed.2d 554 (1971), the Court constrained district judges from extending those plans beyond the school district in which the constitutional violation occurred, *see Milliken v. Bradley*, 418 U.S. 717, 94 S. Ct. 3112, 41 L.Ed.2d 1069 (1974). And the rule that state prisoners could avail themselves of federal habeas corpus even if they failed to observe state procedures, *see Fay v. Noia*, 372 U.S. 391, 83 S. Ct. 822, 9 L.Ed.2d 837 (1963), gave way to the requirement that defendants show "cause and prejudice" for procedural default, *see Wainwright v. Sykes*, 433 U.S. 72, 97 S. Ct. 2497, 53 L.Ed.2d 594 (1977). The Court likewise had to cabin its efforts to examine state administrative procedures case-by-case, *see Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011, 25 L.Ed.2d 287 (1970), reducing such inquiry to only those cases involving "liberty" and "property" interests, *see Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L.Ed.2d 548 (1972). In the midst of this era the Justices themselves engaged in the ad hoc review of state court obscenity rulings, *see, e.g., Redrup v. New York*, 386 U.S. 767, 87 S. Ct. 1414, 18 L.Ed.2d 515 (1967) (per curiam), until they finally cast off "the role of an unreviewable board of censorship for the 50 States" by making obscenity more a jury question, *Miller v. California*, 413 U.S. 15, 22 n. 3, 93 S. Ct. 2607, 37

L.Ed.2d 419 (1973). Other constitutional rulings were simply ridden too far, and the Court eventually had to rein them in. For example, the Court declined to apply the testimonial bar of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966), to impeaching evidence, *see Harris v. New York*, 401 U.S. 222, 91 S. Ct. 643, 28 L.Ed.2d 1 (1971).

The Warren and early Burger Courts focused on finding new substantive rights in the Constitution and downplayed that document's structural mandates. Although many of its individual decisions were overdue and salutary, when the era is considered as a whole, the states were relegated to a second-class constitutional status. As states themselves began to respect the civil rights of all their citizens, however, the justification for additional restrictions began to wear thin. And because "the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union," *Gregory v. Ashcroft*, 501 U.S. 452, 457, 111 S. Ct. 2395, 115 L.Ed.2d 410 (1991) (quoting *Texas v. White*, 74 U.S. (7 Wall.) 700, 725, 19 L.Ed. 227 (1868)), this second era of activism presaged—and indeed guaranteed—a cyclical correction.

C.

This century's third and final era of judicial activism probably began with *New York v. United States*, 505 U.S. 144, 112 S. Ct. 2408, 120 L.Ed.2d 120 (1992), in which the Supreme Court held that the "take title" provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985 impermissibly coerced the states into passing legislation. Since that time, the

Court has issued a spate of decisions striking federal enactments that exceeded Congress' authority at the expense of the states. *See Printz v. United States*, 521 U.S. 98, 117 S. Ct. 2365, 138 L.Ed.2d 914 (1997) (striking the interim background check provision of the Brady Handgun Violence Prevention Act); *City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157, 138 L.Ed.2d 624 (1997) (striking the Religious Freedom Restoration Act of 1993); *Lopez*, 514 U.S. 549, 115 S. Ct. 1624 (1995) (striking the Gun Free School Zones Act of 1990); *see also Seminole Tribe v. Florida*, 517 U.S. 44, 116 S. Ct. 1114, 134 L.Ed.2d 252 (1996) (invalidating Congress' attempt under the Indian Commerce Clause to abrogate the states' Eleventh Amendment immunity).

The common thread of contemporary activism is an interest in reviving the structural guarantees of dual sovereignty. For instance, Congress may not stretch the commerce power so far as to regulate noncommercial areas of traditional state concern—activity that "has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Lopez*, 514 U.S. at 561, 115 S. Ct. 1624. Nor may Congress "define its own powers by altering the Fourteenth Amendment's meaning." *City of Boerne*, 117 S. Ct. at 2168. The Court has preserved the states' immunity in federal court, defending their right not to be sued without consent. *See Seminole Tribe*, 517 U.S. 44, 116 S. Ct. 1114. It has enforced the "etiquette of federalism," *Lopez*, 514 U.S. at 583, 115 S. Ct. 1624 (Kennedy, J., concurring), barring Congress from "commandee[ring] the legislative processes of the States," *New York*, 505 U.S. at 161, 112 S. Ct. 2408 (internal quotation marks omitted), and forbidding the national government from "impress[ing] the state executive into its service" by "command[ing] the States' officers . . . to administer or enforce a federal regulatory program." *Printz*, 117 S. Ct. at 2371, 2384.

Taken as a whole, the decisions preserve Congress as an institution of broad but enumerated powers, and the states as entities having residual sovereign rights.

II.

As abbreviated as the preceding discussion is, it will suffice to pose the critical question. Will the current era of judicial scrutiny stand the tests of time and public acceptance any better than the prior eras have? The facial similarities between the present jurisprudence and the New Deal era underscore the dilemma. Yet upon closer scrutiny, the current wave of judicial decisions bears little relation to those which crested early in this century. If one remains attentive to the pitfalls of the past, the present jurisprudence holds the promise to be an enduring and constructive one, for its aims and means differ significantly from those of prior eras.

A.

As an initial matter, the outcomes of the current era have not consistently favored a particular constituency. In the first era of activism, courts were widely perceived as choosing sides with business interests in the political debate over the expansion of federal and state regulatory power and the abandonment of *laissez-faire*. During this time, all of the Supreme Court's cases limiting the scope of the enumerated powers led to results that were favorable to the commercial class. *See, e.g.*,

Carter, 298 U.S. 238, 56 S. Ct. 855 (1936) (voiding pro-labor provision); *Hammer*, 247 U.S. 251, 38 S. Ct. 529 (1918) (voiding child labor provision). Moreover, the barricade of substantive due process thwarted social and economic advancements drafted not just by Congress, but by state governments as well. *See, e.g.*, *Morehead*, 298 U.S. 587, 56 S. Ct. 918 (1936) (rejecting state minimum wage law); *Adkins*, 261 U.S. 525, 43 S. Ct. 394 (1923) (rejecting federal minimum wage law); *Lochner*, 198 U.S. 45, 25 S. Ct. 539 (1905) (rejecting state maximum hours law). Given this drumbeat of "pro-business" outcomes, critics were able to assemble a solid case that the court was promoting—in a political fashion—the interests of business at the expense of the interests of workingmen and women.

By contrast, the cases of the present era cannot be seen as single-mindedly promoting the interests of a particular constituency. Unlike the cases of the first era, the decisions of the third era display no pattern of favoritism. In fact, the results are unfavorable to a variety of interests. *See New York*, 505 U.S. 144, 112 S. Ct. 2408 (1992) (striking down radioactive waste disposal law); *Lopez*, 514 U.S. 549, 115 S. Ct. 1624 (1995) (striking down criminal law penalizing gun possession); *Seminole Tribe*, 517 U.S. 44, 116 S. Ct. 1114 (1996) (barring suits against unconsenting states authorized by Indian Gaming Regulatory Act); *Printz*, 117 S. Ct. 2365 (1997) (striking down law requiring local law enforcement officials to administer federal regulatory scheme); *City of Boerne*, 117 S. Ct. 2157 (1997) (striking down act aiming to protect the free exercise of religion). As a matter of oxen, the gored are determined by infringements upon our federal system, not by judicial disdain for enacted policies.

Additionally, the cases of the current era arise out of disparate factual contexts, not simply out of repetitious clashes between business and labor interests. The first era's repeated parade of business-labor disputes solidified the perception that the Court was politically hostile to social welfare legislation. To be sure, the current cases present the customary array of amicus briefs advancing the positions of a variety of interest groups. But the identity and alignment of those groups varies, foreclosing the possibility that the judiciary will be seen as politically choosing sides in a single epic struggle. In the present period, the preservation of federalism values—not the maintenance of *laissez faire*—is the binding principle. Interestingly, even the states have occasionally aligned themselves on different sides of federalism issues, sometimes taking positions in derogation of their own sovereign power. *See New York*, 505 U.S. at 154, 112 S. Ct. 2408 (noting that three states intervened as defendants in support of the take-title provision); Brief of 13 States, Amici Curiae, in Support of Respondent, *Printz*, 117 S. Ct. at 2365 (1997) (No. 95-1478) (supporting enlistment of local officials to conduct background checks).

B.

The nature of textual interpretation in the third era also differs from the prior two. The courts of the first era gave an exceedingly narrow definition to the term "commerce," unduly restricting congressional power. By distinguishing commerce from manufacturing, production, and mining, *see, e.g.*, *Carter*, 298 U.S. 238, 56 S. Ct. 855 (1936) (mining is not commerce); *United States v. E.C. Knight Co.*, 156 U.S. 1, 15 S. Ct. 249, 39 L.Ed. 325 (1895) (manufacturing is not commerce), and by

separating economic activities that directly affect interstate commerce from those that have only indirect effects, *see, e.g., Schechter Poultry*, 295 U.S. at 544-50, 55 S. Ct. 837 (wage and hour regulations lack direct relation to interstate commerce), the Supreme Court removed even the plainly economic activities of mines, manufacturing plants, railroads, and merchants from the sphere of regulable "commerce."

The current era of judicial scrutiny does not face this same fundamental textual problem. Courts are not motivated by a desire that a *particular* substantive meaning be given to a constitutional term such as commerce, but instead by the duty to find that *some* meaning must exist. The question now is not what the proper allocation of economic regulatory power ought to be, but whether the states will have *any* subjects of social welfare to call their own. The collapse of the first era's artificial distinctions dictates the third era's interpretive caution. The cases of the third era have not sought to characterize business and economic activity as something other than commerce. Modern courts instead have taken a minimalist approach, withholding only the narrowest of subjects from the ambit of the "commerce" power.

Identifying the connection between commerce and the traditional, noneconomic state concerns addressed by section 13981, however, would require the courts to "pile inference upon inference," in the end sanctioning a commerce power without any limitations. *Lopez*, 514 U.S. at 567, 115 S. Ct. 1624. Although the appellants have presented able arguments in support of section 13981, the Commerce Clause must contain some limitations if its language is not to be completely excised from

the Constitution. The choice we face is between minimal invalidation of congressional intrusion and complete abdication of our interpretive duty. To choose the latter would be to depart from the judicial role of constitutional arbiter set forth nearly two centuries ago in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803).

The search for meaning in textual provisions is common to all three judicial eras. And the real challenge to courts is to refrain from being textually selective. Yet, in reviewing the second and third eras, it is hard to understand how one can argue for giving capacious meanings to some constitutional provisions while reading others out of the document entirely. Here, appellants suggest that we give a reading that would rob all meaning from the phrase "Commerce . . . among the several States," giving Congress a blanket power simply "To regulate." It seems patently inconsistent to argue for a Due Process Clause that means a great deal and a Commerce Clause that means nothing. How one clause can be robust and the other anemic is a mystery when both clauses, after all, are part of our Constitution.

The Supreme Court affirmed in *Lopez* the notion that "commerce" must mean something short of everything. *See* 514 U.S. at 567, 115 S. Ct. 1624 (noting that to uphold statute at issue "would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated"). This is not a radical principle. Rather than lashing out to greatly confine national power, the judiciary is proceeding, cautiously, to find a limiting principle at the margin.

The *Lopez* limit on congressional power is not a strict one, but it is a limit.

C.

Finally, our role in this modern era is not as substantive adjudicators, but as structural referees. The due process decisions of the *Lochner* and Warren Court eras, as well as the individual rights rulings of the latter, attempted to remove the subject matter of those cases from political debate altogether. Those decisions prevented the people from seeking resolutions of their differences through their popularly elected representatives—federal *and* state. By contrast, the present jurisprudence of federalism is purely allocative, standing for the simple proposition that the Constitution does not cast states as mere marionettes of the central government. This jurisprudence removes no substantive decision from the stage of political debate. Nor does this decision command those seeking to protect the rights of women to exit the arena. States remain free after *New York* to reach regional solutions to their hazardous waste problems, after *Lopez* to criminalize the act of bringing a firearm within a school zone, after *Printz* voluntarily to cooperate with federal law enforcement efforts, and after today's decision to provide civil remedies to women who are battered or raped. No court blocks the path of legislative initiative in any of these substantive areas.

Instead of aggressively pursuing substantive preferences, this court validates a structural principle found throughout the Constitution. *See U.S. Const.* art. I, § 8 (enumerating congressional powers); *id.* art. I, § 10 (limiting powers of the states); *id.* art. IV, § 4

(guaranteeing states a republican form of government); *id.* art. V (incorporating states and Congress into the amendment process); *id.* art. VI (making federal law supreme); *id.* amend. X (reserving to states powers not delegated); *id.* amend. XI (making states immune to suit in federal court). Federalism is the shining gem cut by the Founders. It remains the chief contribution of America to democratic theory and the structural guarantor of liberty and diversity for the American people. *See Lopez*, 514 U.S. at 575-76, 115 S. Ct. 1624 (Kennedy, J., concurring).

The role of the judiciary as a structural referee remains essential to the continued vitality of our federal system. *See id.* at 578, 115 S. Ct. 1624 (Kennedy, J., concurring) ("[T]he federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far."). Courts have long adjusted the structural balance of power in our federal system "through judicial exposition of doctrines such as abstention, the rules for determining the primacy of state law, the doctrine of adequate and independent state grounds, the whole jurisprudence of pre-emption, and many of the rules governing our habeas jurisprudence." *Id.* (citations omitted). They have also commonly policed the structural lines inherent in the separation of powers. *See, e.g., Clinton v. City of New York*, 524 U.S. 417, 118 S. Ct. 2091, 141 L.Ed.2d 393 (1998); *INS v. Chadha*, 462 U.S. 919, 103 S. Ct. 2764, 77 L.Ed.2d 317 (1983); *United States v. Nixon*, 418 U.S. 683, 94 S. Ct. 3090, 41 L.Ed.2d 1039 (1974); *Marbury*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60. In so doing, courts have vindicated a simple, foundational principle: The

federal government is one of limited powers not because it chooses to be, but because the Constitution makes that choice for it.

The judicial role in the structural questions of governance is a time-honored one. When Justice Black and Justice Harlan debated the incorporation of the Bill of Rights against the states through the Fourteenth Amendment, great structural principles were at stake. *See, e.g., Malloy*, 378 U.S. at 14-33, 84 S. Ct. 1489 (Harlan, J., dissenting); *Adamson v. California*, 332 U.S. 46, 68-92, 67 S. Ct. 1672, 91 L.Ed. 1903 (1947) (Black, J., dissenting). Whether one agreed with Justice Black or Justice Harlan, no one doubted that the structural question of incorporation was a legitimate debate for the Court. Those who would call the modern era an illegitimate, activist one too easily forget this tradition. They would have it both ways—approving wholly of incorporation and then chastising the courts for passing on the meaning of the enumerated powers. But it is important to remind ourselves of the principle underlying the incorporation debate: The judiciary rightly resolves structural disputes. Just as the relationship of the Bill of Rights to the Fourteenth Amendment was a legitimate structural question for the Court, so too is the debate over the relationship of Article I, Section 8 to the Tenth Amendment. It is just as important for the federal government to live within its enumerated powers as it is for state governments to respect the Bill of Rights. Insisting on both sets the state-federal balance right.

III.

The present controversy is a highly charged one. Some will doubtless be amazed that a federal court could find section 13981 unconstitutional when every American of good will abhors violence against women. Of course, incursions on dual sovereignty will always carry a measure of democratic sanction, representing as they do the enactments of the elected branches of government. Still, the structural dictates of dual sovereignty must not ebb and flow with the tides of popular support.

VAWA's civil suit provision falters for the most basic of reasons. Section 13981 scales the last redoubt of state government—the regulation of domestic relations. By attaching civil penalties to criminal, but domestic, conduct, section 13981 "by its terms has nothing to do with 'commerce.'" *Lopez*, 514 U.S. at 561, 115 S. Ct. 1624. Appellant's defense of the provision rests on the same analogy rejected in *Lopez*—that of attenuated causation to national productivity. *See id.* at 564, 115 S. Ct. 1624 (rejecting "costs of crime" and "national productivity" rationales because they would grant unlimited regulatory powers to Congress).

Section 13981 cannot be sustained under Section 5 of the Fourteenth Amendment for some of the same reasons that it cannot be sustained as an exercise of the commerce power. In both cases the displacement of state prerogatives in areas of traditional state concern would be profound. The displacement under the Fourteenth Amendment would come from the impermissible use of the enforcement and remedial powers of Section 5 to redefine Section 1 to include prohibitions on purely

private actions. If Section 5 alone were read to allow Congress to regulate private (and often purely domestic) conduct, it would, just like an unlimited reading of the Commerce Clause, intrude on what has traditionally been the core of the state police power.* From whatever vantage point one views the case, the rent in the fabric of our federalism would be profound.

Our decision will assuredly be characterized as unjustifiable judicial activism. And just as assuredly, that characterization will miss the mark. It is true that our holding is "activist" in the sense that one provision in a federal statute is declared unconstitutional (the remainder of the Violence Against Women Act remains in effect). What is equally true, however, is that today's decision has the distinguishing features of the third

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* I believe that *City of Boerne* by itself effectively disposes of appellant's Section 5 arguments. The Court in that case was both clear and emphatic: "Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation." *City of Boerne*, 117 S. Ct. at 2164. Here, appellants are seeking the right to redefine the Fourteenth Amendment in contravention of not only the amendment's own language, but also the Supreme Court's recent ruling. *See id.* at 2164-66 (detailing the federalism rationale underlying the restriction of the Fourteenth Amendment to state action).

In relying in its Section 5 analysis extensively upon the *Civil Rights Cases*, 109 U.S. 3, 3 S. Ct. 18, 27 L.Ed. 835 (1883), and *United States v. Harris*, 106 U.S. 629, 1 S. Ct. 601, 27 L.Ed. 290 (1883), I do not understand the majority opinion either to adopt or endorse the discredited holdings in those cases. Rather, the majority relies on them for the same reason that the Supreme Court does, for the proposition that "their treatment of Congress' § 5 power as corrective or preventive, not definitional, has not been questioned." *City of Boerne*, 117 S. Ct. at 2166.

period of judicial scrutiny and not the discrediting features of the previous two. The substance of the issue before us is wholly disparate from *Lopez* and *Printz* and cannot be said to be part of any substantive judicial agenda. The holding here vindicates the structural values of government by reaffirming the concept of enumerated powers. And it vindicates the role of the judiciary in maintaining this structural balance. Finally, it vindicates the textual values of the Constitution by refusing to assign a meaning to "commerce" that is nowhere comprehended by the term.

My fine colleagues in dissent would not have it this way. The dissent simply rewrites the Constitution to its taste. It promotes a congressional power without limitation. Under this view, two pillars of our government will crumble: The courts would have almost no role in structural disputes and the states would play no more than a bit part in our federal system.

The restraints the dissent proposes to prevent this constitutional undoing are wholly ineffectual. First, the dissent argues that Congress can act under the Commerce Clause when it seeks to supplement, not supplant, state actions. *Post* at 930. But practically any exercise of congressional power can be artfully characterized as "supplementary"—it will be the rare case where at least some states do not have some laws that attempt in some fashion to deal with the problem Congress seeks to redress. Second, if congressional enactments can conceivably be called civil rights statutes, then according to the dissent the judiciary must abdicate its role. *Post* at 930-32. Of course, most civil rights statutes should and will be sustained under the Commerce Clause. *See Heart of Atlanta Motel, Inc.*

v. United States, 379 U.S. 241, 85 S. Ct. 348, 13 L.Ed.2d 258 (1964); *Hoffman v. Hunt*, 126 F.3d 575 (4th Cir. 1997). But statutes are not free from constitutional scrutiny solely because of their characterization as civil rights enactments. Third, the dissent asserts that in areas where states cannot "handle the problem," enumerated powers are converted into plenary ones. *Post* at 931. In practice, this will mean that when the state experimentation that our federal system envisages does not take the precise form that Congress prefers, Congress can impose a uniform rule.

Through these unexamined labels and glib formulas, none of which have any foundation in Supreme Court case law, the dissent would sweep the role of the judiciary and the place of the states away. The dissent's response is that the states can fend for themselves in the political system. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554, 105 S. Ct. 1005, 83 L.Ed.2d 1016 (1984). This, however, ignores the vast temptation on the part of Congress to attempt the solution of any and all of our problems, no matter how remote from commerce they may be. I agree that Congress has great latitude in legislating, but under the dissent's rationale, the states must meekly and subserviently swallow whatever Congress serves up. If, as the dissent suggests, judicial acts to safeguard Our Federalism are *ipso facto* violations of separation of powers, the role of the courts would not be what *Marbury* envisioned and the role of the states would not be what the Framers designed.

Maintaining the integrity of the enumerated powers does not mean that statutes will topple like falling dominos. Rather, the values of federalism must be

tempered by the maxims of prudence and restraint. There have been signs, of course, that *Lopez* would presage an era of aggressive intrusion into the activities of coordinate branches. *See, e.g., United States v. Olin Corp.*, 927 F. Supp. 1502, 1521-33 (S.D. Ala. 1996) (holding that as applied Comprehensive Environmental Response, Compensation and Liability Act (CER-CLA) exceeds Congress' commerce power), *rev'd*, 107 F.3d 1506 (11th Cir. 1997). Neither the Supreme Court nor the judiciary as a whole, however, has seen fit to take *Lopez* that far. This is as it should be. A wholesale invalidation of environmental, civil rights, and business regulation would signal a different and disturbing regime—one other than that which we have now. If modern activism accelerates to a gallop, then this era will go the way of its discredited forebear.

In the end, neither swift retreat to cramped notions of commercial activity nor cessation of our judicial role will do. Only a role that is measured and cautious will ensure that a balanced allocation of powers in our federal system remains to protect our individual liberty. Today's holding is a measured one. To sustain this provision would signal that state governments are due no more than the sweet pieties of lip service and that no limits whatsoever exist on the exercise of congressional power.

I would affirm the judgment.

NIEMEYER, Circuit Judge, concurring:

I join the thorough opinion for the court, concluding that neither the Commerce Clause nor Section 5 of the Fourteenth Amendment provides Congress authority

to enact the Violence Against Women Act of 1994, 42 U.S.C. § 13981 (this section hereafter referred to as "VAWA" or the "Act").[1] The broad, virtually limitless reach of VAWA into all violence motivated by gender, including domestic violence, whether implicating interstate commerce or not, far exceeds these constitutionally enumerated powers which were intended to be specific and limited grants of federal legislative authority. As the Tenth Amendment states, if a power is not delegated to the United States or prohibited to the States by the Constitution, it is reserved to the States or to the people. *See* U.S. Const. amend. X.

It may be seductive, albeit undisciplined, to conclude that the Commerce Clause has a virtually unlimited scope simply because the volume of interstate commerce has expanded to the point where today it is difficult to delineate between interstate and local commerce. That indulgence, however, would lead to the conclusion that the federal structure created by the Constitution no longer has applicability. Such a position, striking at the heart of our Constitutional order, would be alarming. Yet, it seems to be the position advanced by the government in this case. Because the government has refused even to recognize a line of demarcation between federal power authorized under the Commerce Clause and the States' retained powers, I write separately to address this issue.

Established Supreme Court precedent points to the existence of limits to the commerce power and defines these limits through two separate modes of analysis. Under one mode, the limits of the commerce power are

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[1] I also agree with the remand of the Title IX claims.

defined by a federal regulation's nexus to interstate commerce. Under the other, the Court has observed that an overly broad exercise of the commerce power can be recognized when the exercise substantially infringes the general police power retained by the states under the Tenth Amendment. I will address each of these methods for defining limits to the commerce power, after first setting the basic factual backdrop.

I

While attending Virginia Polytechnic Institute ("Virginia Tech"), a state-owned university in Blacksburg, Virginia, Christy Brzonkala was sexually assaulted and raped by two football players who also were students at Virginia Tech. Some six months after the incident, Brzonkala filed a complaint against the football players under Virginia Tech's intramural disciplinary procedures. She did not pursue criminal charges because she had not preserved any physical evidence of the rapes. The record is not clear whether she has filed state law tort claims.

Brzonkala claims that persons employed by Virginia Tech, who were overly protective of the football program, frustrated university discipline of the players even though factual findings had been made in a university sponsored process to support Brzonkala's claim. If true, the alleged conduct by responsible university officials displays not only an unflattering lack of courage and judgment, but also a hardened insensitivity to Brzonkala's experience.

This case represents Brzonkala's effort to redress her injury in federal court under VAWA and under Title IX

of the Education Amendments of 1972 to the Civil Rights Act of 1964, 20 U.S.C. § 1681 *et seq.* The defendants in this case have challenged the constitutionality of VAWA, while the United States has intervened to argue that VAWA is constitutional both under the Commerce Clause and under the Equal Protection Clause of the Fourteenth Amendment. I address only the Commerce Clause issue.

At oral argument, the government was pressed at some length to articulate its position on how to define the line between a national interest subject to regulation under the Commerce Clause and a local interest which is beyond the scope of Congress' legislative power. It continually refused to accept the challenge, leaving me with the clear impression that if the political pressure were sufficiently great, the government would feel justified in maintaining the position that Congress could constitutionally regulate local matters, such as divorces and, indeed, even child custody proceedings. Under the impact-on-the-economy test relied on by the government, Congress could rationalize a regulation of these important but traditionally local activities simply by amassing the obviously available economic data showing their aggregate impact on the national economy. I believe that the government's approach, however, reveals a profound misunderstanding of Congress' authority and the limitations of the commerce power.

II

The Commerce Clause vests in Congress the power to "regulate Commerce with foreign Nations, and among the several States." U.S. Const. art. I, § 8,

cl. 3. This power has always been understood to be finite and therefore inadequate to regulate all commercial activity, including commercial activity which is purely local in character and effect. In *The Federalist* No. 45, James Madison wrote:

> The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce. . . . The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State.

The Federalist, at 238 (George W. Carey & James McClellan eds.,1990); *see also The Federalist* No. 40, at 203 (George W. Carey & James McClellan eds., 1990) (James Madison) (Under the Constitution, the federal government's "powers are limited, and the States in all unenumerated cases, are left in the enjoyment of their sovereign and independent jurisdiction"); Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 179 (1996) (noting that rather than believing in unlimited federal legislative power, "most framers agreed that the scope of national law making would remain modest").

In applying this understanding to the Commerce Clause, Chief Justice Marshall, in *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405, 4 L.Ed. 579 (1819), noted that the federal "government is acknowledged by all to be one of enumerated powers. The principle, that

it can exercise only those powers granted to it, . . . is now universally admitted." *See also Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195, 6 L.Ed. 23 (1824) ("The enumeration presupposes something not enumerated. . . . The completely internal commerce of a State, then, may be considered as reserved for the State itself").

The Supreme Court's modern Commerce Clause jurisprudence preserves inviolate this principle that the federal commerce power, while a significant grant of legislative power, is nonetheless finite, possessing identifiable and judicially enforceable boundaries:

> The authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce "among the several States" and the internal concerns of a State. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system.

NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30, 57 S. Ct. 615, 81 L.Ed. 893 (1937). And the vitality of this principle was maintained in the Court's recent decision in *United States v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624, 131 L.Ed.2d 626 (1995), striking down the Gun-Free School Zones Act of 1990 (criminalizing the knowing possession of firearms in a school zone) on the grounds that the activity regulated was not economic; it had too tenuous a connection with commerce; and the statutory provision had no jurisdictional element that would ensure that the prosecuted conduct would have the requisite nexus to interstate commerce. *Id.* at 561, 115 S. Ct. 1624. Central to its holding in *Lopez*, the Court explicitly recognized that there are outer limits

to the reach of the Commerce Clause and that there are local and noncommercial activities which may not be reached by Congress under the Clause. *See id.* at 556-57, 115 S. Ct. 1624.

The Commerce Clause is thus both an enumerated and a limited power authorizing the United States to regulate interstate commerce. But despite 200 years of Commerce Clause jurisprudence, we continue to face the difficult challenge of how to define the limits of the power, distinguishing that which is national from that which is local. In *Jones & Laughlin Steel*, the Court upheld the National Labor Relations Act of 1935 as a proper exercise of the commerce power, reasoning that although that act regulated some intrastate commercial activity, it did not exceed the Commerce Clause's grant of congressional power to regulate interstate commerce because that act only applied to labor practices "affecting [interstate] commerce." These, the Court said, were the "critical words" limiting the National Labor Relations Board's power to regulate labor practices. 301 U.S. at 31, 57 S. Ct. 615. Recognizing that Congress could not regulate local commerce or activity having little relation to interstate commerce, the Court observed that intrastate activities which "have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions" fall within the reach of Congressional power under the Commerce Clause. *Id.* at 37, 57 S. Ct. 615. "It is the effect upon commerce," the Court emphasized, "not the source of the injury, which is the criterion." *Id.* at 32, 57 S. Ct. 615 (citation omitted).

Similarly, in *Wickard v. Filburn*, 317 U.S. 111, 63 S. Ct. 82, 87 L.Ed. 122 (1942), a case upholding the exercise of the Commerce Clause power perhaps at its fullest reach, *see Lopez*, 514 U.S. at 560, 115 S. Ct. 1624, the Court held that the Commerce Clause allowed Congress to regulate a farmer's production of wheat, even for home consumption, when the effect of such consumption by farmers in the aggregate would directly affect the price of wheat in the interstate market. *See Wickard*, 317 U.S. at 127, 63 S. Ct. 82. The Court noted that the Commerce Clause, even though conferring a wide-ranging power, nonetheless possesses constitutionally-prescribed limits, and "the reach of that power extends [only] to those intra state activities which *in a substantial way* interfere with or obstruct the exercise of the granted power." *Id.* at 124, 63 S. Ct. 82 (emphasis added) (internal quotation marks omitted). It is noteworthy that wheat production was recognized as an *economic* activity that had a substantial impact on the price of wheat traded in interstate commerce. Thus, even though wheat production itself "may not be regarded as commerce," it might still be regulated under the Commerce Clause "if it exerts a *substantial economic effect* on interstate commerce." *Id.* at 125, 63 S. Ct. 82 (emphasis added).

Attempting to delineate the "vital" distinction between national and local, the Court in *Jones & Laughlin Steel* stated that the Commerce Clause enables Congress to regulate only intrastate acts which possess a "*close and intimate* relation to interstate commerce." *Id.* at 37, 57 S. Ct. 615 (emphasis added). And similarly in *Lopez*, the Court reiterated that the Commerce Clause may not be extended

> so as to embrace effects upon interstate commerce so *indirect and remote* that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.

Lopez, 514 U.S. at 557, 115 S. Ct. 1624 (quoting *Jones & Laughlin Steel*, 301 U.S. at 37, 57 S. Ct. 615) (emphasis added). Thus, we may conclude that intrastate activities may be regulated under the Commerce Clause, but only if their relationship to interstate commerce is close and intimate and not "indirect and remote."

The requirement that a local activity which Congress seeks to regulate not have merely an "indirect" effect on interstate Commerce draws into question the quality of the nexus between the activity *sought* to be regulated and the interstate commerce *authorized* to be regulated. Drawing on the nature of the constitutional power to regulate interstate commerce, I therefore conclude that a local activity, in order to be covered by the Commerce Clause power, must have a *direct effect* on interstate commerce such that its regulation "targets" interstate commercial activity.

The requirement that a local activity which Congress seeks to regulate not be "remote" in effect on interstate commerce is distinct from the "direct effect" requirement and draws into question the proximateness of the activity's causal effect on interstate commerce. When examining remoteness, we can draw on well established tort principles of proximate cause, asking whether the local activity would stand next in its causation to the effect on interstate commerce and whether its impact is

slight or incidental. *See generally Black's Law Dictionary* 1225-26 (6th ed. 1990). In order not to be remote, an effect must be proximate and intimately related to interstate commercial activity.

Thus, to determine whether an intrastate activity substantially affects interstate commerce and therefore is neither indirect nor remote, I would apply a test which requires that (1) the target of any federal regulation of an intrastate activity must be interstate commerce, even though it may not be the purpose of the regulation,[2] and (2) the effect that the activity has on interstate commerce must be proximate and not incidental.

In addition to being so limited, the commerce power is also limited to regulating *commerce*. If not inherently clear, this was explicitly pointed out in *Lopez*.

When defining the "substantially affects" test, the Supreme Court stated, "Where *economic* activity substantially affects interstate commerce, legislation regulating that activity will be sustained." *Lopez*, 514 U.S. at 560, 115 S. Ct. 1624 (emphasis added). Applying an economic "subject-matter" requirement, the Court struck down the Gun-Free School Zones Act, noting that "by its terms [it] has nothing to do with 'commerce' or any sort of economic enterprise however broadly one

[2] For example, Congress may enact legislation aimed at interstate commerce, even if its purpose is to promote social goals. The Freedom of Access to Clinic Entrances Act of 1994 might be such a law. *See Hoffman v. Hunt*, 126 F.3d 575, 582-88 (4th Cir. 1997) (upholding against a Commerce Clause challenge the Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. § 248).

might define those terms." *Id.* at 561, 115 S. Ct. 1624; *see also id.* at 567, 115 S. Ct. 1624 ("The possession of a gun in a local school is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce"). Moreover, the Court concluded that the economic impact of the conduct regulated did not satisfy this subject-matter requirement. The Court recognized that the economic costs of violent crime, which would obviously be more likely when guns are present, might be "substantial." Thus, despite the fact that the Gun-Free School Zones Act was clearly rationally related to fighting violent crime and that violent crime might have a substantial negative effect on the national economy, the Supreme Court found that the act was not a permissible regulation of interstate commerce. The Court explicitly rejected the "costs of crime" argument as a basis for upholding a statute under the Commerce Clause. *Id.* at 564, 115 S. Ct. 1624. The Court noted that to accept such reasoning would allow Congress to regulate all violent crime and all causes of violent crime. This, the Supreme Court found, the Constitution does not permit.

Despite the Supreme Court's rejection of the "cost of crime" reasoning in *Lopez*, the government advanced a similar argument in this case, positing that because the costs of domestic violence were set out in Congressional "findings," they were sufficient to sustain a federal regulation on domestic violence involving women. In advancing this argument, the government misses the point of *Lopez*. Congressional findings on whether violence involving women has an adverse effect on the economy are just as irrelevant to the proper Commerce Clause analysis as were Executive Branch findings that

gun violence had an adverse economic impact. *Lopez* held that this type of relationship between non-economic activity and the economy does not make the regulated activity subject to regulation under the Commerce Clause.

In sum, a statute depending for its validity on the Commerce Clause power must ultimately *both* be a regulation that reaches intra-state activity only to the extent necessary to regulate interstate commerce *and* be an *economic* regulation.

In considering whether VAWA is constitutional under these principles for applying the Commerce Clause, we begin by noting that violence against women is not commerce, nor is its regulation under VAWA aimed at the protection or promotion of interstate commerce. While it is clear that the congressional focus was trained on violence directed against women, it is just as clear that it was not trained on economic or commercial activity. Judge Luttig's opinion for the court in this case amply describes this congressional focus. *See ante*, at [23a-29a, 64a-70a]. While Congress went to great lengths to justify its enactment based on the impact that violence against women has on the national economy, this kind of rationalization was explicitly rejected in *Lopez*. *See* 514 U.S. at 563-64, 115 S. Ct. 1624. The Court observed there that if it were to accept the cost of crime or the impact of crime on national productivity as justifications, "Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody) for example." *Id.* at 564, 115 S. Ct. 1624.

Such incidental rationalizations do not bring Congress within the specific constitutional grant of authority. The Commerce Clause authorizes only the regulation of interstate commerce. If, in regulating interstate commerce, Congress necessarily must regulate local activity which has a substantial effect on the interstate commerce it seeks to regulate, then it may do so as long as the overall regulatory scheme is aimed at the protection or promotion of interstate commerce. *See Lopez*, 514 U.S. at 561, 115 S. Ct. 1624. For example, in *Wickard*, the case identified as reflecting the broadest permissible reach of the Commerce Clause power, the Court upheld the Agricultural Adjustment Act of 1938, which regulated the amount of a farmer's harvest, even the portion that was intended for home consumption. The production of wheat was an important economic activity having a direct and substantial effect on the supply and therefore the price of wheat. In order to regulate the national wheat market, it was therefore necessary to regulate its important components.[3] The Court noted, "[i]t can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions" which fall within the legitimate domain of Congress under the Commerce Clause. *Wickard*, 317 U.S. at 128, 63 S. Ct. 82. But when, as in the case of VAWA, Congress directs its regulatory efforts at violence, assaults, and torts, or indeed domestic relations, it does not aim at economic activity. Instead, VAWA aims at a social ill which only incidently affects interstate commerce. In that sense, the regulated con-

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[3] This is permissible because Congress has the power to "make all laws which shall be necessary and proper" for executing any of its enumerated powers. U.S. Const. art. I, § 8, cl. 18.

duct's effect on commerce can only be characterized as "indirect."

The government argues that the prohibitions of VAWA promote jobs for women and therefore the economic activity of employment. This argument, however, is not supported by the language of the statute. *See* 42 U.S.C. § 13981. While data may support the finding that violence against women adversely affects the job market and causes an economic loss to the economy, the statute does not reflect an intent to address that economic concern; it does not refer to any job market or workplace, nor does it mention commerce except as a rationalization in its "purpose" section. *See* 42 U.S.C. § 13981(a). Moreover, VAWA does not restrict itself to violence that affects interstate commerce. *Cf. Lopez*, 514 U.S. at 561, 115 S. Ct. 1624 (noting the importance of a "jurisdictional element which would insure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce").[4] In providing additional remedies for violence against women, regardless of its connection with interstate commerce, Congress took aim at a *social ill* and not at *commerce*. Indeed, the data, which Congress claims prompted the enactment of VAWA, indicate Congress' concern with the increasing amount of violence against women, regardless of its economic impact. It is precisely such a broad social concern that falls outside the scope of Congress' Commerce Clause's power.

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[4] Because VAWA contains no jurisdictional hook, this case does not present the issue of how far Congress can extend its power, if at all, to enact legislation through the use of jurisdictional hooks. *Cf. Katzenbach v. McClung*, 379 U.S. 294, 85 S. Ct. 377, 13 L.Ed.2d 290 (1964).

In short, I would hold that the activities regulated by VAWA are too remote from interstate commerce and that the regulation of commerce was not the target at which VAWA was aimed. For this reason, the enactment of VAWA cannot be upheld as a proper constitutional exercise of the Commerce Clause.

III

It is self-evident that if the scope of the commerce power is defined too broadly, our national government would no longer be one of enumerated—and hence limited—powers. This observation brings me to the second method for discerning the limits of the Commerce Clause's scope. If a federal regulation ostensibly justified by the Commerce Clause unduly infringes on the general police power, a power that was never conferred on the national government, it follows that such regulation exceeds the limited federal power. To support this syllogism and apply it in this case, it is therefore necessary to examine (1) whether it is true that the general police power was never intended to be conferred on the federal government and (2) whether VAWA unduly intrudes on the general police power retained by the States.

Over 200 years ago, issues regarding the scope of the new national government's powers dominated the debates surrounding the ratification of the Constitution. What had emerged from Philadelphia in 1787 was a legal text creating a government constructed upon principles of federalism. The Constitution accomplishes this result by limiting the power of the national government, and giving it only enumerated powers. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176,

2 L.Ed. 60 (1803) ("The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written"). In constituting the new national government, no one believed that the people conferred a general police power upon Congress. The Supreme Court most recently observed as much in *Lopez*, noting that the Constitution withholds "from Congress a plenary police power that would authorize enactment of every type of legislation." 514 U.S. at 566, 115 S. Ct. 1624; *see also id.* at 584, 115 S. Ct. 1624 (Thomas, J., concurring) (cautioning that the "substantial effects" test taken to its logical extreme would improperly give Congress "a 'police power' over all aspects of American life"); *United States v. Dewitt*, 76 U.S. (9 Wall.) 41, 43-44, 19 L.Ed. 593 (1869). This proposition is not remarkable because the general police power of the States rests at the core of their sovereignty. Thus, to read the Commerce Clause so broadly as to infringe significantly on the States' general police power would undermine state sovereignty in violation of the federal structure created by the Constitution and confirmed by the Tenth Amendment. Consequently, I believe that the Commerce Clause may not be so broadly interpreted as to authorize wholesale regulation of the sphere traditionally regulated by the States through their general police power.

If the police power was retained by the states and the people, then we must address whether VAWA purports, in contravention of this Constitutional structure, to exercise the general police power.

Because the general police power is recognized to include the right of the States to promote the public

health, safety, welfare, and morals of the State, *see Berman v. Parker*, 348 U.S. 26, 32, 75 S. Ct. 98, 99 L.Ed. 27 (1954), it is not disputed that redress for assault and rape traditionally falls within the States' police power. *See, e.g., Brecht v. Abrahamson*, 507 U.S. 619, 635, 113 S. Ct. 1710, 123 L.Ed.2d 353 (1993) ("The States possess primary authority for defining and enforcing the criminal law. In criminal trials they also hold the initial responsibility for vindicating constitutional rights. Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights") (internal quotation marks omitted); *United States v. Turkette*, 452 U.S. 576, 586 n. 9, 101 S. Ct. 2524, 69 L.Ed.2d 246 (1981) (noting that RICO does not interfere with the States' rights "to exercise their police powers to the fullest constitutional extent"); *see also Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248, 104 S. Ct. 615, 78 L.Ed.2d 443 (1984) (noting "the States' traditional authority to provide tort remedies to their citizens").

Moreover, the redress of sexual assaults and rape is a police power that the States, including Virginia, have traditionally exercised. Virginia law at the time that Brzonkala was attacked identified various crimes whose prosecution might cover the attacks on her. *See, e.g.*, Va. Code Ann. § 18.2-61 (rape); Va. Code Ann. § 18.2-67.3 (aggravated sexual battery); Va.Code Ann. § 18.2-67.1 (forcible sodomy); Va. Code Ann. § 18.2-67.5 (attempted rape, forcible sodomy, object sexual penetration, aggravated sexual battery, and sexual battery). The punishment for rape in Virginia is five years to life imprisonment, and aggravated sexual battery carries a maximum jail sentence of twenty years. Va. Code Ann.

§ 18.2-61(C), 18.2-67.3(B). Moreover, Brzonkala would have civil claims against her attackers under established tort principles. *See, e.g., Parsons v. Parker*, 160 Va. 810, 170 S.E. 1 (1933) (holding that Virginia law recognizes the civil action for rape). And Virginia's interest in exercising its police powers to prohibit and to remedy sexual assaults has been longstanding. Indeed, the commonlaw of Virginia, as it existed before the United States Constitution, criminalized this conduct. *See, e.g., For the Colony in Virginiea Britannia: Lawes Divine, Morall and Martiall, etc.* 12 (David H. Flaherty ed., 1969) (1612) (punishing rape with the death penalty under "Dale's Code," Virginia's earliest code of law); Thomas Jefferson, *Notes on the State of Virginia* 143-44 (William Peden ed., 1954) (1787) (proposing to proportion punishments for crimes existing in Virginia during the period of the Articles of Confederation, which included rape).

Finally, as Virginia has asserted in its brief in this case, it enforces its sexual assault laws and in practice provides victims with "an array of remedies against the perpetrators to redress [these] wrong[s]." Statistical data confirm this assertion. *See* Virginia Criminal Sentencing Commission, *Annual Report* 19-20, (1997). While data are not available for the number of prosecutions as a percentage of the total number of sexual assaults that have taken place, the Virginia courts' compliance with sentencing guidelines for rape is over 90% and their compliance with sexual assault recommendations is over 70%. More revealing is the fact that the greater noncompliance in sexual assault cases can be attributed to the courts' treating sexual offenders *more harshly* than the guidelines recommend. *See id.*

Thus, while the general police power of the States, and of Virginia in particular, covers conduct amounting to sexual assault and rape, VAWA purports to redress that same conduct, limiting its scope only to conduct motivated by gender, as both the language of the statute itself and Congress' explanation for it demonstrate. The statute creates a federal cause of action against a person committing a "crime of violence motivated by gender" and defines a crime of violence to be "an act or series of acts that would constitute a felony against the person or that would constitute a felony against property if the conduct presents a serious risk of physical injury to another." 42 U.S.C. §§ 13981(c), (d)(2)(A). In creating this cause of action, Congress sought to redress all violence against women and did not limit its regulation to violence that has an economic impact, whether on interstate commerce or not. As Justice Kennedy observed in *Lopez* about the Gun-Free School Zones Act of 1990, "neither the actors nor their conduct has a commercial character, and neither the purposes nor the design of the statute has an evident commercial nexus." 514 U.S. at 580, 115 S. Ct. 1624 (Kennedy, J., concurring). These same words describe VAWA. While domestic violence of the type regulated by VAWA undoubtedly impacts the economy, as does almost every human activity, the virtually unlimited scope of domestic violence covered by VAWA can be redressed only by exercise of the general police power by the states.

Violence against women is undoubtedly a *national* problem in that it is a problem that exists throughout every state in the nation. The government created by our Constitution, however, demands not that the problem be repeated in every state but that we determine

whether that violence is a *federal* problem, that is, a problem that can be redressed with a *federal* power. The inquiry, therefore, turns to whether the Constitution enumerates a power with which our federal Congress can regulate violence against women generally. If not, then the Constitution, by its own terms, relegates regulation of the activity "to the States respectively, or to the people." U.S. Const. amend. X.

I recognize that the power to regulate commerce, if exercised by an enactment in fact aimed at regulating commerce, might incidentally overlap with the exercise of the general police power and that such an overlap would not *per se* render the enactment unconstitutional. But it is clear that Congress' undertaking to regulate violence against women through VAWA is not even aimed at the regulation of commerce. In its reports, Congress rationalized its statute only with the argument that the cost of violence against women generally adversely affects the economy. *See, e.g.*, S. Rep. No. 101-545, at 33 (1990) (violence against women is estimated to cost society "at least $3 billion—not million, but billion—dollars a year"); S. Rep. No. 101-545, at 37 (1990) (noting that domestic violence has economic cost to the family and leads to homelessness and increased absences from work); S. Rep. No. 103-138, at 41 (1993) ("estimates suggest that we spend $5 to $10 billion a year on health care, criminal justice, and other social costs of domestic violence"). But this cost-of-crime justification does not limit the statutory language to the regulation of commerce; rather it is a generalized rationalization that can be made equally with respect to all assaults, batteries, and indeed even murders. Each murder, for example, removes permanently from the economy a potentially productive citizen and fractures

families causing further economic impact. Moreover, nowhere can we find any suggestion that women as a class have a more intimate connection with commerce than do men. The statute does not confine itself to the commerce-regulation power, and the regulation of commerce is not its target.

Because VAWA seeks to regulate activity so broadly that it exercises the States' general police power, I am further persuaded that the Act cannot be justified by the limited power of the Commerce Clause.

IV

In summary, the Commerce Clause authorizes Congress to regulate commerce among the States, *i.e.* , the intercourse of economic activity among the States, and local activity insofar as it substantially affects interstate commerce. To satisfy this intrastate reach of the Commerce Clause, however, the effect of the intrastate activity on interstate commerce must be neither indirect nor remote; the federal regulation must be aimed at the regulation of interstate commerce, even though its purpose may be otherwise. Moreover, the scope of the Commerce Clause must be interpreted to preserve the federal structure of the Constitution and the States' general police power as an essential aspect of their sovereignty within that structure. Because VAWA regulates intrastate activity too broadly, detaching itself from any semblance of regulating interstate commerce, it is unconstitutional.

DIANA GRIBBON MOTZ, Circuit Judge, dissenting:

In response to a mountain of compelling evidence that violence animated by gender bias deprives many citizens of their civil rights, substantially affects the national economy and interstate commerce, and creates a profound problem that the states had been unable to remedy, Congress enacted the Violence Against Women Act of 1994. In passing this legislation, Congress took care to identify the constitutional source of its authority, expressly finding that the regulated activity—gender-motivated violence—has a "substantial adverse affect on interstate commerce." Furthermore, Congress specifically limited the reach of the statute challenged here, in order to ensure that it did not interfere with any state law or regulate in any area of traditional state concern.

Nevertheless, a majority of this court today holds that Congress had no power to enact this legislation. The majority can reach this conclusion only by disregarding controlling Supreme Court precedent, by refusing to give Congress's eminently rational findings proper deference, by creating troubling new rules of constitutional analysis, and by mischaracterizing the statute before us.

I recognize that people of good will—including federal judges—could believe that the statute challenged here does not constitute good public policy. But judges' policy choices provide no basis for finding a statute unconstitutional. *See Vance v. Bradley*, 440 U.S. 93, 97, 99 S. Ct. 939, 59 L.Ed.2d 171 (1979) ("The Constitution presumes that, absent some reason to infer antipathy,

even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think the political branch has acted."). Thus, regardless of our personal policy choices, we must uphold a statute unless it violates the Constitution.

Proper judicial review of the massive congressional record inexorably leads to the conclusion that Congress had a rational basis for finding that gender-motivated violence substantially affects interstate commerce. Further, even when subjected to the most searching examination, it is clear that this carefully drawn statute neither interferes with state regulation nor legislates in an area of traditional state concern. Accordingly, I believe a court must conclude that Congress properly exercised its constitutional authority in enacting this statute. Therefore, I respectfully dissent.

I.

When considering the appeal of "an order granting a motion to dismiss under Fed. R. Civ. P. 12(b)(6), [a court] must accept as true the facts alleged in the complaint." *McNair v. Lend Lease Trucks, Inc.*, 95 F.3d 325, 327 (4th Cir. 1996). Christy Brzonkala, who entered Virginia Polytechnic Institute (Virginia Tech) as a freshman in the fall of 1994, alleges the following facts in her complaint.

On the evening of September 21, 1994, Brzonkala and another female student met two men who Brzonkala knew only by their first names and their status as members of the Virginia Tech football team. Within thirty minutes of first meeting Brzonkala, these two men, later identified as Antonio Morrison and James Crawford, raped her.

Brzonkala and her friend met Morrison and Crawford on the third floor of the dormitory where Brzonkala lived. All four students talked for approximately fifteen minutes in a student dormitory room. Brzonkala's friend and Crawford then left the room. Morrison immediately asked Brzonkala if she would have sexual intercourse with him. She twice told Morrison "no," but Morrison was not deterred. As Brzonkala got up to leave the room, Morrison grabbed her and threw her, face-up, on a bed. He pushed her down by the shoulders and disrobed her. Morrison turned off the light, used his arms to pin down her elbows, and pressed his knees against her legs. Brzonkala attempted to push Morrison off, but to no avail. Without using a condom, Morrison forcibly raped her.

Before Brzonkala could recover, Crawford came into the room and exchanged places with Morrison. Crawford also raped Brzonkala by holding down her arms and using his knees to pin her legs open. He, too, used no condom. When Crawford was finished, Morrison raped her for a third time, again holding her down and again without a condom.

When Morrison had finished with Brzonkala, he warned her "You better not have any fucking diseases." In the months following the rape, Morrison announced publicly in the dormitory's dining room that he "like[d] to get girls drunk and fuck the shit out of them."

Following the assault, Brzonkala became depressed and avoided contact with most residents of her dormitory outside of her own room. She radically changed her appearance by cutting off her long hair. She ceased attending classes and eventually attempted suicide. She sought assistance from a Virginia Tech psychia-

trist, who prescribed anti-depressant medication. Neither the psychiatrist nor any other Virginia Tech employee made more than a cursory inquiry into the cause of Brzonkala's distress. She later sought and received a retroactive withdrawal from Virginia Tech for the 1994-95 academic year.

Approximately a month after Morrison and Crawford assaulted Brzonkala, she confided in her roommate that she had been raped, but could not bring herself to discuss the details. It was not until February 1995 that Brzonkala was able to identify Morrison and Crawford as the men who had raped her. Two months later, she filed a complaint against them under Virginia Tech's current sexual assault policy, which had been formally released for dissemination to students on July 1, 1994, but was not yet incorporated into the Student Handbook. After Brzonkala filed her complaint, she learned that another male student athlete was overheard advising Crawford that he should have "killed the bitch."

Brzonkala did not pursue criminal charges against Morrison or Crawford, believing that criminal prosecution was impossible because she had not preserved any physical evidence of the rape. Virginia Tech did not report the rapes to the police, and did not urge Brzonkala to reconsider her decision not to do so. Sexual assault of a female student by a male student is the only violent felony that Virginia Tech authorities do not automatically report to the university or town police.

Virginia Tech held a hearing on Brzonkala's complaint against Morrison and Crawford. At the hearing, which was tape-recorded and lasted three hours, a number of persons, including Morrison and Crawford, testified. Morrison admitted that even though Brzon-

kala had twice told him "no," he had sexual intercourse with her in the dormitory on September 21. Crawford, who denied that he had sexual contact with Brzonkala (a denial corroborated by his suitemate, Cornell Brown), confirmed that Morrison had engaged in "sexual contact" with Brzonkala.

The Virginia Tech judicial committee found insufficient evidence to take action against Crawford, but found Morrison guilty of sexual assault. The committee imposed an immediate suspension on Morrison for two semesters (one school year). In May, 1995, Morrison appealed this decision, claiming that the college had denied him his due process rights and had imposed an unduly harsh and arbitrary sanction. Cathryn T. Goree, Virginia Tech's Dean of Students, notified Brzonkala in a letter dated May 22, 1995 that she had rejected Morrison's appeal and upheld his suspension for the Fall 1995 and Spring 1996 semesters. According to Virginia Tech's published rules, the decision of Dean Goree, as the appeals officer on this matter, was final.

In the first week of July 1995, however, Dean Goree and another Virginia Tech official, Donna Lisker, personally called on Brzonkala at her home in Fairfax, Virginia, a four-hour drive from Virginia Tech. These officials advised Brzonkala that Morrison's attorney had threatened to sue the school on due process grounds, and that Virginia Tech thought there might be merit to Morrison's "ex post facto" challenge that he was charged under a sexual assault policy that was not yet spelled out in the Student Handbook. Dean Goree and Ms. Lisker told Brzonkala that Virginia Tech was unwilling to defend in court the school's decision to suspend Morrison for a year, and that are a rehearing under the university's disciplinary policy as it existed

prior to the adoption of the sexual assault policy was required. To induce Brzonkala to participate in a second hearing, Dean Goree and Ms.Lisker assured Brzonkala that Virginia Tech officials believed her story, and that the second hearing was a mere technicality to cure the school's error in bringing the first complaint under a version of the sexual assault policy not contained in the Student Handbook.

Brzonkala submitted to a second hearing, which was scheduled for late July. This hearing was *de novo* and lasted seven hours, more than twice as long as the first hearing. Brzonkala was required to engage her own legal counsel at her own expense. Moreover, the university belatedly informed her that student testimony given at the first hearing would not be admissible at the second hearing and that, if she wanted the second judicial committee to consider this testimony, she would have to submit sworn affidavits. Because she received insufficient notice, it was impossible for Brzonkala to obtain the necessary affidavits from her student witnesses. In contrast, the school provided Morrison with sufficient notice to give him ample time to procure the sworn affidavits of his student witnesses. Virginia Tech exacerbated this inequity by refusing both Brzonkala and her attorney access to the tape recordings of the first hearing, while granting Morrison and his attorney complete and early access to those tapes. Finally, Virginia Tech officials prevented Brzonkala from mentioning Crawford in her testimony because charges against him had been dismissed; as a result she had to present a truncated version of events.

Nevertheless, the university judicial committee found Morrison guilty of abusive conduct, and re-

imposed the sanction that it had set after the first hearing: an immediate two-semester suspension.

Morrison again appealed; this appeal was successful. On August 21, 1995, in a letter attached to the complaint, Senior Vice-President and Provost Peggy Meszaros notified Morrison of her decision to set aside his sanction. The Provost explained that in her view "there was sufficient evidence to support the decision that [he] violated the University's Abusive Conduct Policy and that no due process violation occurred in the handling of [his] case." She further informed Morrison, however, that his immediate suspension for one school year was "excessive when compared with other cases where there has been a finding of violation of the Abusive Conduct Policy." Provost Meszaros did not elaborate on the "other cases" to which she was referring. Instead of an immediate one-year suspension, the Provost imposed "deferred suspension until [Morrison's] graduation from Virginia Tech." In addition, Morrison was "required to attend a one-hour educational session with Rene Rios, E.O./AA Compliance Officer regarding acceptable standards under University Student Policy."

Virginia Tech did not notify Brzonkala of these changes in the outcome of her case. Instead, on August 22, 1995, Brzonkala learned from an article in *The Washington Post* that the university had lifted Morrison's suspension and that he would return to campus for the Fall 1995 semester. Morrison did in fact return to Virginia Tech in the Fall of 1995, on a full athletic scholarship.

Upon learning that the university had set aside Morrison's suspension and was permitting him to return in the Fall, Brzonkala canceled her own plans to

return to Virginia Tech. She did this because she feared for her personal safety and because she believed that Virginia Tech had repudiated her claim that Morrison had raped her.

Brzonkala believes and so alleges that Head Football Coach Frank Beamer, as part of a coordinated university plan to allow Morrison to play football in 1995, participated directly and indirectly in the process by which the sanction against Morrison was overturned.

On December 27, 1995, Brzonkala filed suit against Morrison, Crawford, and Virginia Tech. On March 1, 1996, she amended her complaint. Her amended complaint alleges *inter alia* that Virginia Tech, in its handling of her rape claims and failure to punish the rapists in any meaningful manner, violated Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 (1994). She also alleges that Morrison and Crawford brutally gang-raped her because of gender animus in violation of Subtitle C of the Violence Against Women Act of 1994 (VAWA), 42 U.S.C. § 13981 (1994). The United States intervened to defend the constitutionality of VAWA.

The district court dismissed the Title IX claims against Virginia Tech for failure to state a claim upon which relief could be granted, and it dismissed Brzonkala's VAWA claims against Morrison and Crawford because it found VAWA to be beyond Congress's constitutional authority. I address first the Title IX claim and then the VAWA claim.

II.

Title IX of the Education Amendments of 1972 provides in relevant part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . .

20 U.S.C. § 1681(a)(1994). Virginia Tech concedes that it is an "education program . . . receiving Federal financial assistance." Hence, the only question is whether Brzonkala has sufficiently alleged that she was "subjected to discrimination" by Virginia Tech "on the basis of sex." 20 U.S.C. § 1681(a).

The district court recognized that Brzonkala pled a Title IX claim on the basis of two distinct legal theories: a hostile environment theory, that Virginia Tech responded inadequately to a sexually hostile environment; and a disparate treatment theory, that Virginia Tech discriminated against Brzonkala because of her sex in its disciplinary proceedings. For the reasons set forth in the panel opinion in this case, *Brzonkala v. Virginia Polytechnic Inst.*, 132 F.3d 949, 961-62 (4th Cir. 1997), I believe that Brzonkala has failed to allege a disparate treatment claim.

As for the hostile environment claim, determination of its validity must await the Supreme Court's decision in *Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390 (11th Cir. 1997), *cert. granted*, — U.S. ——, 119 S. Ct. 29, 141 L.Ed.2d 789 (1998), which should provide substantial guidance as to whether Title IX establishes a cause of action to remedy a hostile environment of the sort Brzonkala alleges. The majority apparently agrees, but it remands the case so that the district court can hold the resolution of this issue in abeyance pending the *Davis* decision. Remand of this legal question, which will almost inevitably be appealed, only

wastes time and scarce judicial resources. Rather than creating unnecessary extra work for the district court, we should, as we ordinarily do, hold our own opinion in abeyance until the Supreme Court rules. *See, e.g.*, *Lissau v. Southern Food Serv., Inc.*, 159 F.3d 177, 181 (4th Cir. 1998); *United States v. Hairston*, 96 F.3d 102, 105 (4th Cir. 1996).

III.

With regard to the civil rights provision of the Violence Against Women Act of 1994 (VAWA), 42 U.S.C. § 13981 (1994), the district court held that Brzonkala's complaint stated a claim against Morrison and Crawford. The court concluded, however, that this portion of VAWA was unconstitutional because Congress lacked the authority to enact it. Like the majority, I agree with the district court that Brzonkala stated a claim. After careful review of the statute, however, I can only conclude that Congress acted within its broad authority in passing this legislation. I would therefore reverse the district court's ruling to the contrary and allow Brzonkala to pursue her claim.

A.

In September 1994, after four years of hearings, Congress enacted VAWA in order to address "the escalating problem of violence against women." S.Rep. No. 103-138, at 37 (1993). Subtitle C, the portion of the statute at issue in this case, establishes the right upon which a civil rights claim can be brought:

> All persons within the United States shall have the right to be free from crimes of violence motivated by gender. . . .

42 U.S.C. § 13981(b).

The statute goes on to set forth the elements necessary to plead and prove such a claim:

> (c) Cause of action
>
> A person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) of this section shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.
>
> (d) Definitions
>
> For purposes of this section—
>
> (1) the term "crime of violence motivated by gender" means a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender; and
>
> (2) the term "crime of violence" means—
>
> (A) an act or series of acts that would constitute a felony against the person or that would constitute a felony against property if the conduct presents a serious risk of physical injury to another, and that would come within the meaning of State or Federal offenses described in section 16 of Title 18, whether or not those acts have actually resulted in criminal charges, prosecution, or conviction and whether or not those acts were committed in the special maritime, territorial, or prison jurisdiction of the United States; and
>
> (B) includes an act or series of acts that would constitute a felony described in subparagraph (A) but for the relationship between the person who takes such action and the individual against whom such action is taken.

42 U.S.C. § 13981. Thus, to state a claim under § 13981(c) a plaintiff must allege that he or she has been the victim of a specific kind of felony—"a crime of violence motivated by gender." 42 U.S.C. § 13981(c).

Morrison and Crawford do not argue that Brzonkala's allegation of gang rape fails to satisfy § 13981(d)(2)'s definition of a "crime of violence." However, they do briefly assert that Brzonkala has failed to allege a "crime of violence *motivated by gender*." 42 U.S.C. § 13981(c) (emphasis added).

A "crime of violence motivated by gender" is defined as "a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender." 42 U.S.C. § 13981(d)(1). Congress has indicated that "[p]roof of 'gender motivation' under" Subtitle C of VAWA is to "proceed in the same ways proof of race or sex discrimination proceeds under other civil rights laws. Judges and juries will determine 'motivation' from the 'totality of the circumstances' surrounding the event." S.Rep. No. 103-138, at 52; *see also* S.Rep. No. 102-197, at 50 (1991).

The statute does not reach "[r]andom acts of violence unrelated to gender." 42 U.S.C. § 13981(e)(1). However, bias "can be proven by circumstantial as well as indirect evidence." S.Rep. No. 103-138, at 52. "Generally ac-

cepted guidelines for identifying hate crimes may also be useful" in determining whether a crime is gender-motivated, such as "language used by the perpetrator; the severity of the attack (including mutilation); the lack of provocation; previous history of similar incidents; absence of any other apparent motive (battery without robbery, for example); common sense." *Id.* at 52 n. 61.

Brzonkala alleges that two virtual strangers, Morrison and Crawford, brutally raped her three times within minutes of first meeting her. Although Brzonkala does not assert that they mutilated her, the brutal and unprotected gang rape itself constitutes an attack of significant "severity." *Id.* Moreover, Brzonkala alleges that the rapes were completely without "provocation." *Id.* One of her assailants conceded during the college disciplinary hearing that Brzonkala twice told him "no" before he initially raped her. Further, there is an absence of any "apparent motive" for the rapes other than gender bias. *Id.* For example, no robbery or other theft accompanied the rapes.

Finally, Brzonkala alleges that when Morrison had finished raping her for the second time he told her, "You better not have any fucking diseases." She also alleges that Morrison later announced in the college dining room, "I like to get girls drunk and fuck the shit out of them." Verbal expression of bias by an attacker is certainly not mandatory to prove gender bias, but it is "helpful." S. Rep. No. 103-138, at 51. As the district court noted, Morrison's "statement reflects that he has a history of taking pleasure from having intercourse with women without their sober consent" and that "[t]his statement indicates disrespect for women in general and connects this gender disrespect to sexual

intercourse." 935 F. Supp. at 785. In addition, since Brzonkala alleged that Morrison and Crawford engaged in a conspiracy to rape her, Morrison's comments are also relevant in assessing Crawford's liability. *See Loughman v. Consol-Pennsylvania Coal Co.*, 6 F.3d 88, 103 (3rd Cir. 1993) (in a civil conspiracy "every conspirator is jointly and severally liable for all acts of co-conspirators taken in furtherance of the conspiracy"); *United States v. Carpenter*, 961 F.2d 824, 828 n. 3 (9th Cir. 1992) (holding that "acts and statements in furtherance of the conspiracy may be attributed to" a co-conspirator and citing *Pinkerton v. United States*, 328 U.S. 640, 646-47, 66 S. Ct. 1180, 90 L.Ed. 1489 (1946)); *United States v. Chorman*, 910 F.2d 102, 111 (4th Cir. 1990) (same).

In sum, Brzonkala has clearly alleged violations of the civil rights provision of VAWA. I find puzzling the majority's statement that these allegations "do not necessarily compel the conclusion that Morrison acted with animus toward women as a class, and might not even be sufficient, without more, to defeat a motion either for summary judgment or for a directed verdict." *Ante*, at 830. If the majority is simply indicating that Brzonkala may be unable to prove some or all of the allegations in her complaint, the statement is unremarkable. But if the majority is suggesting that, even if Brzonkala offers adequate evidence to support each and every one of these allegations, such evidence still might not be sufficient to prove a claim of gender-animated violence, the statement is incomprehensible. Brzonkala has alleged virtually all of the earmarks of a violent, felonious "hate crime": an unprovoked, severe attack, triggered by no motive other than gender-based animus, and accompanied by language clearly reflecting

such animus. If she provides evidence proving these allegations, she is entitled to have a factfinder weigh that evidence.

B.

The remaining, and critical, issue is whether the district court correctly held that Congress exceeded its constitutional authority in enacting the civil rights provision of VAWA. Congress directly addressed this very question. On the basis of numerous specific findings and a host of evidence, Congress stated in the statute itself that it was invoking its authority "[p]ursuant to . . . section 8 of Article I of the Constitution" in order to protect the civil rights of "victims of gender motivated violence and to promote public safety, health, and activities affecting interstate commerce by establishing a Federal civil rights cause of action for actions of violence motivated by gender." 42 U.S.C. § 13981(a).[1] Article I, Section 8, Clause 3 of the

[1] Congress also expressly stated that Section 5 of the Fourteenth Amendment authorized enactment of this statute. *See* 42 U.S.C. § 13981(a). In view of my conclusion that the statute is a valid exercise of Congress's Commerce Clause power, I need not reach the question of whether the Fourteenth Amendment also authorized it. Despite the majority's statements to the contrary, however, nothing in the record demonstrates that Brzonkala or the Government "primarily" defended Subtitle C as a valid exercise of Congress's Fourteenth Amendment power in reaction to *United States v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624, 131 L.Ed.2d 626 (1995), or that they subsequently "retreated to defend" it "primarily as an exercise" of Commerce Clause power in reaction to *City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157, 138 L.Ed.2d 624 (1997). *Ante*, at 826. In their initial briefs before a panel of this court, the Government and Brzonkala argued both issues—allotting substantial attention to both, but perhaps slightly more to the Fourteenth Amendment; for example, that issue was addressed first. In the supplemental briefs submitted to the *en banc* court after the panel had, without reaching the Fourteenth Amendment question, upheld the statute as a valid exercise of Congress's commerce power, the Government and Brzonkala again addressed both issues. This time, however, they devoted slightly more attention to the Commerce Clause argument, placing it first. Although the supplemental briefs were filed after *Boerne* issued, it seems to me that the parties' slight change in emphasis could well be simply a reaction to the perceived interest of our court.

Constitution empowers Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. Our task is to determine whether Congress had a rational basis for reaching this conclusion.

1.

In making this assessment, we must keep certain principles in mind. First, the Supreme Court has directed that when a court is "asked to invalidate a statutory provision that has been approved by both Houses of Congress and signed by the President, particularly an Act of Congress that confronts a vexing national problem, it should do so only for the most compelling constitutional reasons." *Mistretta v. United States*, 488 U.S. 361, 384, 109 S. Ct. 647, 102 L.Ed.2d 714 (1989). This is "particularly" true where, as here, the legislative "judgments are based in part on empirical determinations." *Board of Educ. of Westside Community Schools v. Mergens*, 496 U.S. 226, 251, 110 S. Ct. 2356, 110 L.Ed.2d 191 (1990).

Second, a court faced with a challenge to an exercise of the commerce power owes even greater deference to Congress than a court asked to determine whether a federal statute violates an express prohibition of the Constitution. As Justice Kennedy explained in *United States v. Lopez*, "[t]he substantial element of political

judgment in Commerce Clause matters leaves our institutional capacity to intervene more in doubt than when we decide cases, for instance, under the Bill of Rights even though clear and bright lines are often absent in the latter class of disputes." 514 U.S. 549, 579, 115 S. Ct. 1624, 131 L.Ed.2d 626 (1995) (Kennedy, J., concurring); *see also id.* at 568, 115 S. Ct. 1624 ("The history of the judicial struggle to interpret the Commerce Clause . . . counsels great restraint before the Court determines that the Clause is insufficient to support an exercise of the national power."). In accordance with these principles, the Supreme Court has long held, and recently reiterated in *Lopez*, that the proper inquiry for a court when considering a challenge to Congress's Commerce Clause power is "whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce." 514 U.S. at 557, 115 S. Ct. 1624.

In *Lopez*, the Supreme Court concluded that the Gun-Free School Zones Act of 1990 (GFSZA), 18 U.S.C. § 922(q)(1994), fell outside Congress's commerce power. *Id.* at 567, 115 S. Ct. 1624. Several characteristics of the GFSZA led the Court to this conclusion. As the facts of the case demonstrated, and as the Court noted, *id.* at 561 n. 3, 115 S. Ct. 1624, the GFSZA effectively supplanted state criminal regulation with federal regulation; the defendant had initially been charged by state police with violation of a state criminal law punishing the possession of a firearm at a school, but those charges were dropped after federal agents charged him with violation of the GFSZA, *id.* at 551, 115 S. Ct. 1624. Moreover, although the Government defended the GFSZA as a proper exercise of the commerce power, the statute by its own terms had "nothing to do with

'commerce,'" contained no jurisdictional element ensuring a connection to interstate commerce in each case, and was supported by no congressional findings demonstrating that gun possession near schools had a substantial effect on interstate commerce. *Id.* at 561-62, 115 S. Ct. 1624. The Supreme Court noted that, in these circumstances, it "would have to pile inference upon inference" to find a rational basis for concluding that the activity regulated by the GFSZA "substantially affect[s] any sort of interstate commerce." *Id.* at 567, 115 S. Ct. 1624. This the Court declined to do, and it therefore declared that Congress had exceeded its Commerce Clause power in enacting the GFSZA. *Id.*

In contrast to the congressional silence about its basis for passing the GFSZA, Congress created a voluminous record demonstrating its reasons for enacting VAWA. Accordingly, a court in this case can begin where the *Lopez* Court could not, by "evaluat[ing] the legislative judgment that the activity in question substantially affected interstate commerce." *Id.* at 563, 115 S. Ct. 1624; *see also City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157, 2169-70, 138 L.Ed.2d 624 (1997) (noting the importance of Congressional findings in determining the "appropriateness of [Congress's] remedial measures"). In taking the legislative record supporting Subtitle C into account, I recognize that discerning a rational basis "is ultimately a judicial rather than a legislative question," *Lopez*, 514 U.S. at 557 n. 2, 115 S. Ct. 1624 (quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 273, 85 S. Ct. 348, 13 L.Ed.2d 258 (1964) (Black, J., concurring)), and that "simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." *Id.* (quoting *Hodel v.*

Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 311, 101 S. Ct. 2352, 69 L.Ed.2d 1 (1981) (Rehnquist, J., concurring)). But when Congress has made a specific finding that the regulated activity adequately affects interstate commerce, a "court must defer" to that finding if Congress had "any rational basis for such a finding." *Hodel*, 452 U.S. at 276, 101 S. Ct. 2352.

The Supreme Court ha. consistently recognized the importance of deference .o Congressional findings in Commerce Clause cases and has never struck down a statute that was supported by a finding that the regulated activity had the necessary effect on commerce. *See* Lawrence H. Tribe, *American Constitutional Law*, 310-11 (2d. ed. 1988) (noting that the Supreme Court "has without fail given effect to" congressional findings). When the rationale for congressional action appears in the legislative record, the proper inquiry in assessing commerce power challenges involves examination of that record and determination of whether it demonstrates that Congress had a rational basis for finding that the regulated activity substantially affects interstate commerce. *See, e.g., Hodel*, 452 U.S. at 275-83, 101 S. Ct. 2352; *Hodel v. Indiana*, 452 U.S. 314, 326, 101 S. Ct. 2376, 69 L.Ed.2d 40 (1981); *Perez v. United States*, 402 U.S. 146, 155-56, 91 S. Ct. 1357, 28 L.Ed.2d 686 (1971); *Katzenbach v. McClung*, 379 U.S. 294, 299-301, 85 S. Ct. 377, 13 L.Ed.2d 290 (1964); *Heart of Atlanta Motel*, 379 U.S. at 252-254, 85 S. Ct. 348. *See also United States v. Leshuk*, 65 F.3d 1105, 1111-12 (4th Cir. 1995) (rejecting a *Lopez* challenge to the Comprehensive Drug Abuse Prevention and Control Act by relying heavily upon Congress's "detailed findings" concerning the interstate commerce effects of the regulated activity). Accordingly, I turn to that inquiry.

2.

The congressional findings and testimony that support the enactment of VAWA under the Commerce Clause are detailed and extensive.[2] Space limitations prevent setting them all out here. But even abbreviated excerpts from the vast legislative record demonstrate that Congress carefully and repeatedly documented the substantial effect that gender-based violence has on interstate commerce and the national economy. For example, Congress found that:

> • "Gender-based crimes and the fear of gender-based crimes restricts movement, reduces employment opportunities, increases health expenditures, and reduces consumer spending, all of which affect interstate commerce and the national economy." S. Rep. No. 103-138, at 54.
>
> • "Gender-based violence bars its most likely targets—women—from full participation in the national economy." *Id.*

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[2] Most of Congress's findings do not appear in the statute itself, but in applying rational basis review courts also consider findings of congressional committees. *See Lopez*, 514 U.S. at 562, 115 S. Ct. 1624; *see also Preseault v. ICC*, 494 U.S. 1, 17, 110 S. Ct. 914, 108 L.Ed.2d 1 (1990) (citing House Report in discussion of congressional findings regarding effect on interstate commerce of federal "rails-to-trails" statute); *Hodel*, 452 U.S. at 277-80, 101 S.Ct. 2352 (relying on committee reports to uphold Congress's power under the Commerce Clause to enact the Surface Mining and Reclamation Control Act); *Hoffman v. Hunt*, 126 F.3d 575, 587 (4th Cir. 1997) (relying on a House Report to uphold Freedom of Access to Clinic Entrances Act (FACE) as a legitimate exercise of Commerce Clause power).

> • "[P]roblem[s] of domestic violence . . . because of their interstate nature, transcend the abilities of State law enforcement agencies." *Id.* at 62.

Indeed, in the Conference Committee Report on VAWA, Congress made detailed and express findings, which were originally part of the text of the statute itself and were removed only to avoid cluttering the United States Code. *See Violence Against Women: Law and Litigation* § 5:40 and § 5:42 (David Frazee et al. eds., 1997). The conference report included the ultimate finding that

> crimes of violence motivated by gender have *a substantial adverse effect on interstate commerce*, by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved, in interstate commerce . . . , by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products.

H.R. Conf. Rep. No. 103-711, at 385 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1839, 1853 (emphasis added).

Congress additionally explained that "the cost" of gender-motivated violence "is staggering." S. Rep. No. 101-545, at 33 (1990). One example of such gender-motivated violence is domestic violence, which alone is estimated to cost employers "$3 to $5 *billion* annually due to absenteeism in the workplace." *Women and Violence: Hearing Before the Committee on the Judiciary*, 101st Cong. 58 (1990) (statement of Helen K. Neuborne) (emphasis added). Furthermore, "estimates suggest that we spend $5 to $10 billion a year on health

care, criminal justice, and other social costs of domestic violence." S. Rep.No. 103-138, at 41. Congress noted "[i]t is not a simple matter of adding up the medical costs, or law enforcement costs, but of adding up all of those expenses plus the costs of lost careers, decreased productivity, foregone educational opportunities, and long-term health problems." S. Rep. No. 101-545, at 33.

These monetary figures were accompanied by other evidence establishing that gender-motivated violence has a substantial impact on interstate commerce:

> Over 1 million women in the United States seek medical assistance each year for injuries sustained by their husbands or other partners. As many as 20 percent of hospital emergency room cases are related to wife battering.
>
> But the costs do not end there: woman abuse "has a devastating social and economic effect on the family and the community." . . . It takes its toll in homelessness: one study reports that as many as 50 percent of homeless women and children are fleeing domestic violence. It takes its toll in employee absenteeism and sick time for women who either cannot leave their homes or are afraid to show the physical effects of the violence.

Id. at 37 (footnote omitted).

Congress further found that the fear of violence "takes a substantial toll on the lives of *all* women, in lost work, social, and even leisure opportunities." S. Rep. No. 102-197, at 38 (1991) (emphasis added). Thus, the legislature expressly recognized, as the Senate explained, that

> women often refuse higher paying night jobs in service/retail industries because of the fear of attack. Those fears are justified: the No. 1 reason why women die on the job is homicide and the highest concentration of those women is in service/retail industries . . . . 42 percent of deaths on the job of women are homicides; only 12 percent of the deaths of men on the job are homicides.

S. Rep. No., 103-138, at 54 n.70 (citations omitted).

Congress also explicitly found that the states refused or were unable to deal effectively with the problems created by gender-based violence. The Conference Report concluded that "bias and discrimination in the [state] criminal justice system[s] often deprives victims of crimes of violence motivated by gender of equal protection of the law." H.R. Conf. Rep. No. 103-711, at 385. Numerous reports from the state supreme courts demonstrated to the Senate "that crimes disproportionately affecting women are often treated less seriously than comparable crimes against men," and the Senate concluded that "these reports provide overwhelming evidence that gender bias permeates the [states'] court system." S. Rep. No. 102-197, at 43-44. Congress further indicated that a uniform national approach to these problems was needed by noting that, while federal statutes currently provide "a civil rights remedy" for gender-based violence in the workplace, no such remedy existed for gender-based violence "committed on the street or in the home." H.R. Conf. Rep. No. 103-711, at 385.

The majority does not assert that these findings lack documentation or power.[3] Instead, it nitpicks them. *See ante*, at 847-50. For example, the majority suggests that because hearings were held by "three different Congresses" and some of the congressional findings were general, they do not deserve deference. *Id.* at 847-48. But in *Hodel*, the Supreme Court relied on numerous general findings from five different Congresses to uphold the challenged statute. 452 U.S. at 278-80 & n. 19, 101 S. Ct. 2352. Indeed, the *Hodel* Court specifically commended Congress for holding "extended hearings during which vast amounts of testimony and documentary evidence" were received, demonstrating "six years of the most thorough legislative consideration." *Id.* at 278-79, 101 S. Ct. 2352. Thus, the Supreme Court has praised precisely the kind of full and extended congressional consideration that the majority criticizes.

The majority also suggests that because the Senate found in 1993, a year prior to the passage of VAWA and two years prior to issuance of the *Lopez* decision, that gender-based violence "affects" (rather than "substantially affects") interstate commerce and that VAWA therefore met the "*modest threshold* required by the

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[3] These specific findings are not mere "incidental rationalizations." *See ante*, at—(Niemeyer, J., concurring). Rather, Congress has demonstrated that gender-motivated violence is an "activity having a direct and substantial effect on the supply and therefore the price" of health care, consumer goods, and the like in the same way that a farmer's consumption of his home-grown wheat was held in *Wickard v. Filburn*, 317 U.S. 111, 128, 63 S. Ct. 82, 87 L.Ed. 122 (1942), to have the requisite effect on interstate commerce because of its impact on the supply and price of the national wheat market. *But see ante*, at 902-03 (Niemeyer, J., concurring).

Commerce Clause," *ante*, at 850, none of Congress's findings merits deference. Given that the Supreme Court has repeatedly deferred to a congressional record containing evidence that an activity affected interstate commerce without any specific findings as to the degree of this effect, *see, e.g.*, *McClung*, 379 U.S. at 299, 85 S. Ct. 377; *Heart of Atlanta Motel*, 379 U.S. at 246, 85 S. Ct. 348, and that in *Lopez* the Court reiterated that "Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce," *Lopez*, 514 U.S. at 562, 115 S. Ct. 1624, this contention is a makeweight at best.[4] In fact, a panel of this court, which included two members of today's majority, recently relied on congressional committee reports to uphold a federal statute in the face of a post-*Lopez* Commerce Clause challenge even though those reports—and the statute itself—found merely that the regulated activity affected (not substantially affected) interstate commerce. *See Hoffman v. Hunt*, 126 F.3d 575, 587 (4th Cir. 1997) (citing H.R. Conf. Rep. No. 103-488 at 7-8 (1994), *reprinted in* 1994 U.S.C.C.A.N. 724, 724-25);

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[4] Similarly, the majority's contention as to the statute's purposes is meritless. The majority asserts that one of Subtitle C's "express statutory purpose[s]"—"to promote *public safety, health, and activities affecting interstate commerce*"—exhibits Congress's "misapprehension of the scope of the power to regulate interstate commerce." *Ante*, at 850-51. But in *Hodel*, the Supreme Court held that Congress could properly exercise its Commerce Clause power to require restoration of mined "prime farmland," which had only an "infinitesimal" effect on interstate commerce, 452 U.S. at 322-24, 101 S. Ct. 2376, *because* Congress could reasonably act to protect "agriculture, the environment, *or public health and safety, injury to any of which interests would have deleterious effects on interstate commerce*," *id.* at 329, 101 S. Ct. 2376 (emphasis added).

Freedom of Access to Clinic Entrances Act of 1994, Pub. L. No. 103-259, § 2, 108 Stat. 694 (1994); *see also Terry v. Reno*, 101 F.3d 1412, 1416 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1264, 117 S. Ct. 2431, 138 L.Ed.2d 193 (1997).

Moreover, the majority's critique of the findings here ignores one of those findings' most significant characteristics. A year *after* the Senate Report that the majority faults, Congress enacted VAWA upon receipt from the Conference Committee of findings (which were originally included in the statute itself) that gender-based violence has a "*substantial* adverse effect on interstate commerce." H.R. Conf. Rep. No. 103-711, at 385 (emphasis added). That Congress made these express findings *prior* to the issuance of *Lopez*, when the importance of congressional findings that regulated activity has a "substantial" effect on interstate commerce had not yet been explicated, plainly demonstrates just how strong Congress found the link between gender-based violence and interstate commerce to be.

The majority further claims that findings and evidence of the effects of gender-based violence on the *national economy* are irrelevant because they do not "describe the effects of gender-motivated violence on *interstate commerce*." *Ante*, at 850. The Commerce Clause, however, pertains to more than just interstate commerce; it gives Congress a plenary power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. This broad provision of authority encompasses the power to regulate problems affecting the national economy as a whole. The Commerce Clause does not render "the nation powerless to defend

itself against economic forces that Congress decrees inimical or destructive of the national economy. Rather it is an affirmative power commensurate with national needs." *North American Co. v. SEC*, 327 U.S. 686, 705, 66 S. Ct. 785, 90 L.Ed. 945 (1946). Thus, the mere fact that a statute addresses a problem affecting the national economy in general, rather than interstate commerce in particular, does not deprive Congress of the authority to enact it under the Commerce Clause.

The majority eventually concedes that VAWA's "legislative record" demonstrates "that violence against women is a sobering problem . . . that . . . ultimately does take a toll on the national economy" and "supports an inference that some portion of this violence, and the toll it exacts, is attributable to gender animus." *Ante*, at 852. Nonetheless, the majority holds that Congress exceeded its Commerce Clause authority in enacting VAWA. I cannot agree.

Proper application of the mandated rational basis standard of judicial review simply does not permit the result reached by the majority. That standard requires us to answer a single question: did Congress have a rational basis for finding, as it expressly did, that serious violence motivated by gender animus has "a substantial adverse affect on interstate commerce by deterring potential victims from traveling interstate, from engaging in employment in interstate commerce, and from transacting with business, and in places involved, in interstate commerce . . . , by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products." H.R. Conf. Rep. No. 103-711, at 385. Congress so found only after four years of hearings and consideration of massive amounts of testi-

mony, statistics, and other evidence. Analysis of this legislative record unquestionably demonstrates that each one of Congress's findings as to the substantial, deleterious impact of gender-based violence on interstate commerce is grounded in abundant evidence. In fact, it is hard to envision more careful legislative consideration, a more complete legislative record, or more amply supported legislative findings. In light of the voluminous, persuasive record and the extensive deliberation supporting Subtitle C, my independent evaluation of Congress's "legislative judgment," *Lopez*, 514 U.S. at 563, 115 S. Ct. 1624, compels me to conclude that Congress had a rational basis for finding that gender-based violence substantially affects interstate commerce.[5]

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[5] The majority contends that in reaching this conclusion I have failed to engage in any "independent analysis of whether gender-motivated violence substantially affects interstate commerce." *Ante*, at 857. First, I note that this criticism epitomizes the majority's flawed approach to the question before us—judges are not to determine in the first instance whether a regulated activity substantially affects interstate commerce. Rather, they are, as the *Lopez* Court directed, "to evaluate the *legislative judgment* that the activity in question substantially affected interstate commerce." *Lopez*, 514 U.S. at 563, 115 S. Ct. 1624 (emphasis added).

Second, the majority's criticism that I have failed to make any "independent analysis" would only be valid if "independent analysis" required one to disagree with Congress. The majority offers no support for such a notion, and there is none. In fact, Supreme Court precedent demonstrates that if a court, after evaluating a statute and its legislative record, finds that it agrees with Congress's legislative judgment that a regulated activity substantially affects interstate commerce, the opinion of the court need only identify the relevant portions of the legislative record and state the court's conclusion that the legislative judgment made by Congress had a rational basis. *See, e.g., Hodel*, 452 U.S. at 277-80, 101 S. Ct. 2352 (describing legislative record and then stating,

Supreme Court precedent well supports this conclusion. Certainly legislators could rationally find that the impact of gender-motivated violence on interstate commerce was at least as substantial as the impact of growing wheat for home consumption, *see Wickard v. Filburn*, 317 U.S. 111, 125, 63 S. Ct. 82, 87 L.Ed. 122 (1942) ("even if . . . activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce"), or racial discrimination, *see McClung*, 379 U.S. at 304, 85 S. Ct. 377 (Congress had a "rational basis" for believing that racial discrimination by local (non-chain) restaurants located in a single state affected interstate commerce), or local loansharking, *see Perez*, 402 U.S. at 156, 91 S. Ct. 1357 (Congress rationally concluded that local loansharking affects interstate commerce because it supports "organized crime," which "exacts millions from the pockets of people"). As the Supreme Court explained in *Heart of Atlanta Motel*, "if it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." 379 U.S. at 258, 85 S. Ct. 348 (internal citation omitted).

Given Congress's clear finding that gender-based violence has a substantial effect on interstate commerce, the compelling evidence in the legislative record

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"[i]n light of the evidence available to Congress and the detailed consideration that the legislation received, we cannot say that Congress did not have a rational basis for concluding that surface coal mining has substantial effects on interstate commerce"); *Heart of Atlanta*, 379 U.S. at 252-53, 85 S. Ct. 348 (citing evidence in legislative record, in the absence of any findings, and then stating "the voluminous testimony presents overwhelming evidence that discrimination by hotels and motels impedes interstate travel"). I have done precisely that here.

supporting that finding, and the fact that the challenged statute in no way interferes with state action on matters of traditional state concern, it seems to me that a court can only uphold Subtitle C. Significantly, every court to consider the question, except the majority and the court below, has reached the same conclusion. *See Liu v. Striuli*, 36 F. Supp.2d 452, 1999 WL 24961 (D.R.I. 1999); *Ziegler v. Ziegler*, 28 F. Supp.2d 601 (E.D. Wash. 1998); *Crisonino v. New York City Housing Auth.*, 985 F. Supp. 385 (S.D. N.Y. 1997); *Anisimov v. Lake*, 982 F. Supp. 531 (N.D. Ill. 1997); *Seaton v. Seaton*, 971 F. Supp. 1188 (E.D. Tenn. 1997); *Doe v. Hartz*, 970 F.Supp. 1375 (N.D. Iowa 1997), *rev'd on other grounds*, 134 F.3d 1339 (8th Cir. 1998); *Doe v. Doe*, 929 F. Supp. 608 (D. Conn. 1996); *Timm v. DeLong*, No. 8:98CV43 (D. Neb. June 22, 1998); *Mattison v. Click Corp. of America, Inc.*, Civ.A. No. 97-CV-2736, 1998 WL 32597 (E.D. Pa. Jan. 27, 1998).[6]

C.

The length and the prolixity of the majority opinion fail to mask the deep flaws in its rationale for invalidating Subtitle C. The majority creates an unprecedented new rule of law and relies upon fundamentally unsound notions of both the judicial function and the demands of federalism.

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[6] Other courts have, without discussion of the constitutional question, held that a plaintiff has stated a valid cause of action under Subtitle C and so refused to grant defendants' motions to dismiss. *See, e.g., Kuhn v. Kuhn*, No. 98 C 2395, 1998 WL 673629 (N.D. Ill. Sept. 16, 1998); *see also Wesley v. Don Stein Buick, Inc.*, 985 F. Supp. 1288, 1300-01 (D. Kan. 1997) (permitting plaintiff to amend her complaint to state a claim under Subtitle C without reaching the constitutional question).

1.

Perhaps the most obvious of the majority's errors is its creation of a new rule that confines Congress's power under the Commerce Clause to either the direct regulation of economic activities or the enactment of statutes containing jurisdictional elements. This new rule depends upon a distorted view of *Lopez* and a cavalier disregard for the Supreme Court's other Commerce Clause precedents. Moreover, the majority's contention that this new rule justifies its holding demonstrates a serious misunderstanding of the statute before us. Under the governing case law, including *Lopez*, Congress clearly had the authority to enact Subtitle C under the Commerce Clause.

The majority cites *Lopez* as the source for its rule that Commerce Clause legislation is unconstitutional unless it regulates economic activities or contains a jurisdictional element. *Lopez*, the majority contends, "expressly held that *because* the Gun-Free School Zones Act 'neither regulate[d] a commercial activity nor contain[ed] a requirement that the possession be connected in any way to interstate commerce,'" *ante*, at 831-32 (quoting *Lopez*, 514 U.S. at 551, 115 S. Ct. 1624) (emphasis added), "it exceed[ed] the authority of Congress 'to regulate . . . Commerce among the several States,'" *id.* (quoting U.S. Const. art. I, § 8, cl. 3). *See also ante*, at 833-37.

Notwithstanding the frequency and vehemence with which the majority makes this assertion, it constitutes a fundamental mischaracterization of the Supreme Court's decision. To be sure, *Lopez* held that the GFSZA did not regulate a "commercial activity" or "contain[] a requirement [*i.e.*, a jurisdictional element] that the possession be connected in any way to interstate commerce." *Lopez*, 514 U.S. at 551, 115 S. Ct. 1624. But the *Lopez* Court never held that the challenged statute exceeded Congress's authority *because* it did not fit into one of these categories. If the *Lopez* Court had struck down the GFSZA for these reasons alone, its opinion would have ended after discussion of these two issues at 514 U.S. at 562, 115 S. Ct. 1624. Instead, the Court continued—for an additional six pages—to evaluate whether one could rationally conclude that possession of a gun in a school zone substantially affected interstate commerce. *Lopez*, 514 U.S. at 562-68, 115 S. Ct. 1624. The Court only invalidated the GFSZA after pointing out the lack of congressional findings establishing a substantial effect on interstate commerce, after noting that the statute displaced state policy choices in an area of traditional state concern, and after considering and rejecting the Government's arguments.

A new rule restricting Congress's power under the Commerce Clause to regulating economic activity or enacting statutes containing jurisdictional elements undeniably conflicts with the pre-existing Commerce Clause jurisprudence that the *Lopez* Court approved. The *Lopez* Court quoted *Wickard v. Filburn*'s famous teaching that "even if appellee's activity be local and *though it may not be regarded as commerce, it may still, whatever its nature*, be reached by Congress *if it exerts a substantial economic effect on interstate commerce*." 317 U.S. at 125, 63 S. Ct. 82 (emphasis added), *quoted in Lopez*, 514 U.S. at 556, 115 S. Ct. 1624. That statement simply cannot be reconciled with the majority's new rule.

Similarly, in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 57 S. Ct. 615, 81 L.Ed. 893 (1937), which was also approved in *Lopez*, the Supreme Court explained that

> [t]he fundamental principle is that the power to regulate commerce is the power *to enact "all appropriate legislation" for "its protection and advancement."* . . . That power is plenary and may be exerted to protect interstate commerce "no matter what the source of the dangers which threaten it."

Id. at 36-37, 57 S. Ct. 615 (emphasis added) (citations omitted); *see also Heart of Atlanta Motel*, 379 U.S. at 258, 85 S. Ct. 348 ("The power of Congress to *promote* interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce." (emphasis added)). It is this power—the power to protect, advance, and promote commerce—that Congress invoked in passing Subtitle C. *See also Goetz v. Glickman*, 149 F.3d 1131, 1137 (10th Cir. 1998) (rejecting argument that "Congress' commerce power is limited to restricting or prohibiting an activity," concluding "'[i]t is now indisputable that the power to regulate interstate commerce includes the power to promote interstate commerce'") (quoting *United States v. Frame*, 885 F.2d 1119, 1126 (3d Cir. 1989)).

In arguing that Subtitle C is unconstitutional because it does not directly regulate economic activity, the majority slights these principles and ignores the expressly-stated purpose of the statute: *"to promote* . . . activities affecting interstate commerce by

establishing a Federal civil rights cause of action for victims of crimes of violence motivated by gender." 42 U.S.C. § 13981(a) (emphasis added). The legislative record identifies these "activities" as including interstate travel, access to health care services, employment in general, the employment of victims of gender-based violence in particular, and—more particularly still—the employment of such individuals in certain sectors of the economy. In Subtitle C, Congress legislated against gender-based violence under the Commerce Clause as a means of "protection and advancement" of these and other economic activities. *See Jones & Laughlin*, 301 U.S. at 36-37, 57 S. Ct. 615.

The fact that in enacting Subtitle C Congress was also legislating against a moral wrong renders the enactment "no less valid" under the Commerce Clause. *See Heart of Atlanta Motel*, 379 U.S. at 257, 85 S. Ct. 348. That a statute was not explicitly meant "to increase the gross national product by removing a barrier to free trade, but rather to protect personal safety and property rights, is irrelevant [because] Congress can regulate interstate commerce for any lawful motive." *United States v. Soderna*, 82 F.3d 1370, 1374 (7th Cir. 1996) (Posner, C.J.); *see also United States v. Weslin*, 156 F.3d 292, 296 (2d Cir. 1998) ("it does not matter whether Congress's motive in enacting the statute was commercial, noncommercial, or mixed. For Congress may regulate interstate commerce for any purpose not affirmatively forbidden by the Constitution").

In sum, established precedent renders the majority's contention that gender-based violence itself is not an economic activity simply beside the point. In an effort to escape this precedent, the majority suggests that *Lopez* heralds a new era of Commerce Clause jurispru-

dence in which courts will fly speck congressional judgments, striking them down if they do not regulate a sufficiently economic activity or do not contain a jurisdictional element. That is certainly not what the *Lopez* Court said. As an inferior court, we must follow what the Supreme Court says, not what we believe, or hope, its opinions fore ordain.

The *Lopez* Court said that the GFSZA "plow[ed] thoroughly new ground and represent[ed] a sharp break with the long-standing pattern of federal firearms legislation," 514 U.S. at 563, 115 S. Ct. 1624 (internal quotation marks omitted), indicating that it was enunciating what two members of the five person majority expressly stated was a "limited holding," *id.* at 568, 115 S. Ct. 1624 (Kennedy, J., concurring). Of course, the *Lopez* Court did refuse to make an "additional expansion" of Congress's commerce power to uphold the GFSZA, and it clarified that a regulated activity must "substantially" affect interstate commerce. But as the majority itself apparently acknowledges, *ante*, at 854, the *Lopez* Court did not overrule a single Commerce Clause precedent. Nor, as detailed within, *see infra*, at 922-23, did it abandon the "rational basis" test. *Id.* at 557-68, 115 S. Ct. 1624; *see also United States v. Hartsell*, 127 F.3d 343, 348 n.1 (4th Cir. 1997) (*Lopez* is not "a radical sea change which invalidates the decades of Commerce Clause analysis"); *United States v. Wright*, 117 F.3d 1265, 1269 (11th Cir. 1997) ("*Lopez* did not alter our approach to determining whether a particular statute falls within the scope of Congress's Commerce Clause authority"), *vacated in part on other grounds*, 133 F.3d 1412 (11th Cir. 1998); *United States v. Wilson*, 73 F.3d 675, 685 (7th Cir. 1995) (the *Lopez* Court "reaffirmed, rather than overturned,

the previous half century of Commerce Clause precedent").

Rather, in describing the history of the Court's Commerce Clause jurisprudence, *Lopez* forthrightly embraced the modern expansive view of Congress's power under the Commerce Clause, and eschewed the more restrictive view of "commerce" that relied on formalistic distinctions. *Id.* at 555, 115 S. Ct. 1624. Justice Kennedy's concurrence specifically warned us *not* to seek "mathematical or rigid formulas" for deciding the constitutionality of statutes under the Commerce Clause. 514 U.S. at 573, 115 S. Ct. 1624 (Kennedy, J., concurring) (*citing Wickard*, 317 U.S. at 123 n.24, 63 S. Ct. 82). The concurrence also cautioned against a strict requirement that the regulated activity itself be connected with commerce, noting that the history of the Supreme Court's Commerce Clause jurisprudence demonstrates the "imprecision of content-based boundaries used without more to define the limits of the Commerce Clause." *Id.* at 574, 115 S. Ct. 1624 (Kennedy, J., concurring). Yet the majority's new rule mandates the use of precisely such rigid requirements and "content-based boundar[ies]."

The majority's attempt to distinguish the case at hand from *Hoffman*, 126 F.3d at 575, in which this court recently held the Freedom of Access to Clinic Entrances Act (FACE) to be within Congress's Commerce Clause authority, tellingly demonstrates the problems with such formalistic rules. FACE contains no jurisdictional element and, as we pointed out, "the activity regulated" was "not itself economic or commercial." *Id.* at 587. Rather the regulated conduct, like the activity regulated by Subtitle C, was identified as the "use of force" or the "threat of force" that sufficiently affects

interstate commerce. *Id.* Thus, FACE patently does not satisfy the majority's new rule, which restricts Congress's Commerce Clause authority to enactment of statutes with jurisdictional elements or regulations of economic activity.

Implicitly recognizing this, the majority slips in an exception to its rule for regulation of non-economic activity that has a "meaningful connection" with "specific" economic activities. *Ante*, at 834. It claims that, unlike protests at abortion clinics, gender-based violence lacks such a connection. *Id.* But Congress expressly found that gender-based violence does affect specific economic activities, *e.g.*, the participation of its victims in the labor market and the provision of health-care services, and that the connection of gender-based violence to these activities is "meaningful" both in particular instances and in the aggregate.

The majority's rule thus forces it to contend that these economic activities are insufficiently "specific" and that the effect of gender-based violence upon such activities is insufficiently "direct." *Id.* at 834, 837. Such specificity and directness requirements find no support in the governing "substantially affects" test, however. Indeed, the majority's requirement that the activity be "specific" conflicts with that test; it suggests that once an activity affecting commerce becomes wide-spread enough to be "general," its effects somehow become insufficiently "substantial" to justify an exercise of the Commerce Clause power. Moreover, as noted in *Lopez*, the Supreme Court "departed from the distinction between 'direct' and 'indirect' effects on interstate commerce" in 1937 in *NLRB v. Jones & Laughlin*, 301 U.S. 1, 57 S. Ct. 615, 81 L.Ed. 893 (1937), and has never returned to such distinctions because they "artificially [] constrain[] the authority of Congress to regulate interstate commerce." *Lopez*, 514 U.S. at 555-56, 115 S. Ct. 1624. The majority opinion amply proves the wisdom of the *Lopez* Court's rejection of such rigid and technical tests for determining constitutionality under the Commerce Clause; as the majority's difficulty with its own formula shows, such tests lead only to a proliferation of dubious distinctions.

The majority's new rule also conflicts with the Supreme Court's specific holding, subsequent to *Lopez*, that an activity need not be commercial in character in order to come within the scope of the Commerce Clause. Just two terms ago, in *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 117 S. Ct. 1590, 137 L.Ed.2d 852 (1997), the Court held that a state law adversely affecting a nonprofit camp violated the dormant Commerce Clause. At the outset of its analysis the *Camps* Court noted that the "reasoning" of cases involving "Congress' affirmative Commerce Clause powers" also applied in the context of the dormant Commerce Clause. *Id.* at 1597. The Court then rejected arguments made by those defending the statute "that the dormant Commerce Clause is inapplicable [] because the campers are not 'articles of commerce' or more generally that interstate commerce is not at issue here." *Id.* The critical inquiry was not whether campers constituted "articles of commerce" or whether attending camp constituted an economic activity; rather, the challenged statute implicated the Commerce Clause because the services provided by the camp "clearly ha[d] a substantial effect on interstate commerce." *Id.*

Not only is the majority's new rule without precedent, the premises underlying that rule are seriously

misconceived. The majority contends that gender-based violence is "a type of crime relatively unlikely to have any economic character at all." *Ante*, at 834. *See also id.* at 835. This argument only makes sense if one utterly ignores the effects of gender-based violence and instead focuses entirely on the motives of its perpetrators. There is, however, no reason to define the character of a crime by reference only to the actor's motive. Such reasoning leads to incongruous results. For example, arson is clearly a property crime, but on the majority's rationale it would not be considered as such in cases where the perpetrator had no interest in destroying anything, but only wanted to see the flames.

Moreover, the majority's implicit claim that gender-based harm to persons is insufficiently economic to be regulable under the commerce power involves a disturbing anomaly, as recent events demonstrate. A few months ago in Baltimore, an apparent victim of gender-based violence was found locked in the trunk of a car, which had been set on fire. The majority's approach would appear to give Congress the authority, under the Commerce Clause, to provide a remedy for the damage done to the car, but not for the victim's medical expenses, lost wages, or other damages.[7]

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[7] The distinction between harm to property and harm to persons is not merely a hypothetical one here; rather it is directly relevant to the scope of the majority's holding, because Subtitle C applies to property damage as well. It is difficult to see how the majority's rationale about economic activities could apply to this aspect of the statute. Could one honestly say that a statute, which provides a remedy for property damage caused by gender-based violence, regulates an activity that is *insufficiently economic* to come within the commerce power? One could only do so by falling back on unfounded categorical assertions that violence, or at least gender-based violence, is not an economic activity. One certainly could not say that a statute providing a remedy for gender-based property damage regulates "a type of crime relatively unlikely to have any economic character at all." *Ante*, at 834. This aspect of Subtitle C would thus seem to be unaffected by the court's opinion today. Yet the majority purports to invalidate Subtitle C in its entirety.

In sum, the majority has created a new and troubling rule out of whole cloth. *Lopez* cannot be fairly read to restrict congressional authority under the Commerce Clause to regulation of economic activities and enactment of statutes containing a jurisdictional element. Indeed, Supreme Court precedent, including *Lopez*, rejects the use of such rigid, formalistic rules. The core teaching of *Lopez* remains true to the Court's prior and subsequent precedent: Congress must ensure that legislation enacted pursuant to its Commerce Clause authority reaches only activities that "substantially affect interstate commerce," and the courts must ensure that Congress has performed this constitutional obligation in a rational manner.

2.

The majority's second fundamental mistake results from its absolute refusal to recognize our restricted role as judges. Due to this error, the majority fails to apply the correct standard of judicial review and to give proper deference to the legislative judgment challenged here.

The Constitution creates a government of separated powers, in which legislative authority is allocated to Congress. Courts can, of course, refuse to give effect to an otherwise properly enacted law if they find it inconsistent with the Constitution. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-78, 2 L.Ed. 60 (1803). But to

prevent this mighty judicial power from engulfing and ultimately eliminating the legislative powers reserved to Congress, the Supreme Court has established that acts of Congress are entitled to a strong presumption of constitutionality. *See Flemming v. Nestor*, 363 U.S. 603, 617, 80 S. Ct. 1367, 4 L.Ed.2d 1435 (1960).

Chief Justice Rehnquist, the author of the principal opinion in *Lopez*, has elaborated upon this rule of judicial restraint, noting that because "[j]udging the constitutionality of an Act of Congress is properly considered the gravest and most delicate duty that this Court is called upon to perform," constitutional review of a statute begins with "deference" to the "duly enacted and carefully considered decision of a coequal and representative branch of our Government." *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 319, 105 S. Ct. 3180, 87 L.Ed.2d 220 (1985) (internal quotation marks omitted). The Chief Justice has further explained that such deference is only appropriate because a court "must have due regard to the fact that [it] is *not exercising a primary judgment* but is sitting in judgment upon those who also have taken the oath to observe the Constitution and who have the responsibility for carrying on government." *Rostker v. Goldberg*, 453 U.S. 57, 64, 101 S. Ct. 2646, 69 L.Ed.2d 478 (1981) (internal quotation marks omitted) (emphasis added). Justice Kennedy, concurring in *Lopez*, similarly noted that "the sworn obligation to preserve and protect the Constitution in maintaining the federal balance" belongs "*in the first and primary instance*" to the legislative and executive branches, not the judiciary. *Lopez*, 514 U.S. at 577, 115 S. Ct. 1624 (Kennedy, J., concurring) (emphasis added).

As the opening words of its opinion demonstrate, the majority steadfastly refuses to recognize the constraints placed upon the judiciary by the separation of powers. In purporting to act on behalf of "We the People" in striking Subtitle C—an act of the people's duly elected legislature—the majority seeks to augment its limited judicial authority with a representative authority that it does not in fact possess. Indeed, the majority's resort to this kind of rhetoric constitutes an implicit acknowledgment that an unelected, unaccountable federal court could not, on its own power, properly invalidate Subtitle C.

Although the majority attempts to echo the *Lopez* Court by invoking "foundational" principles to justify its holding, the *Lopez* Court expressly recognized that maintenance of the proper balance of power requires respect for more than one such principle: "Just as the separation and independence of the coordinate branches of the Federal Government serves to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Lopez*, 514 U.S. at 552, 115 S. Ct. 1624 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458, 111 S. Ct. 2395, 115 L.Ed.2d 410 (1991)). Thus, while the Supreme Court in *Lopez* recognized that *both* separation of powers and federalism are foundational or first principles, the majority utterly ignores the former in an effort to elevate the latter. *Compare ante*, at 825-26, with *Lopez*, 514 U.S. at 552, 115 S. Ct. 1624.

The majority manifests its lack of respect for the separation of powers by refusing to apply the rational basis standard of review, even though it assertedly recognizes that this standard controls here. *See ante*, at

857-58.[8] Indeed, the majority complains about the "incessant invocations" of this standard by Brzonkala and the Government. *Ante*, at 857. It seems natural, however, to refer frequently to the governing standard of judicial review in a case, like this one, in which application of that standard is critical. Moreover, the parties do no more than quote and follow the Supreme Court, which has consistently (not to say incessantly) invoked precisely this standard. *See, e.g., Preseault*, 494 U.S. at 17, 110 S. Ct. 914 (deference to congressional findings of sufficient effect on interstate commerce is required if there is "*any rational basis* for such a finding") (emphasis added); *Hodel*, 452 U.S. at 277, 101 S. Ct. 2352 (when "Congress has determined that an activity affects interstate commerce, the courts need only inquire whether the finding is *rational*") (emphasis added); *McClung*, 379 U.S. at 303-04, 85 S. Ct. 377 (after a court determines that Congress had "a *rational basis* for finding a chosen regulatory scheme necessary to the protection of commerce" the court's "investigation is at an end") (emphasis added).

Although the *Lopez* Court did clarify that activity must "substantially" affect interstate commerce in order for Congress to regulate it under the Commerce Clause, the Court did not in any way retreat from the well-established rational basis standard of judicial review. To the contrary, the *Lopez* Court explained that since *NLRB v. Jones & Laughlin*, 301 U.S. 1, 57 S. Ct. 615, 81 L.Ed. 893 (1937)—which both recognized a "greatly expanded" view of Congress's power under the Commerce Clause and warned that this power is

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[8] The majority also maintains that I do not apply the rational basis standard and that it does. *See ante*, at 857-58. I am content to let the reader judge.

"subject to outer limits"—the Supreme Court "has heeded this warning and undertaken to decide whether a *rational basis* existed for concluding that a regulated activity sufficiently affected interstate commerce." *Lopez*, 514 U.S. at 556-57, 115 S. Ct. 1624 (emphasis added) (citing *Hodel*, *Perez*, *McClung*, and *Heart of Atlanta Motel*).

In refusing to apply the rational basis standard, the majority stands alone. Every one of our sister circuits to consider a post-*Lopez* Commerce Clause challenge, as well as this court itself in an earlier case, has respected and applied the rational basis standard to uphold a wide range of federal statutes. *See United States v. Franklyn*, 157 F.3d 90, 93 (2d Cir.) *cert. denied*, — U.S. —, 119 S. Ct. 563, —L.Ed.2d — (1998) (upholding 18 U.S.C. § 922(o), which criminalizes the possession or transfer of handguns); *United States v. Cardoza*, 129 F.3d 6, 11-13 (1st Cir. 1997) (upholding Youth Handgun Safety Act); *Hoffman v. Hunt*, 126 F.3d 575, 584-88 (4th Cir. 1997) (upholding Freedom of Access to Clinic Entrances Act (FACE)); *United States v. Knutson*, 113 F.3d 27 (5th Cir. 1997) (upholding 18 U.S.C. § 922(o) criminalizing the possession or transfer of machine guns); *United States v. Parker*, 108 F.3d 28, 29-31 (3d Cir.) (reversing district court and upholding Child Support Recovery Act), *cert. denied*, — U.S. —, 118 S. Ct. 111, 139 L.Ed.2d 64 (1997); *United States v. Olin Corp.*, 107 F.3d 1506, 1509-11 (11th Cir. 1997) (upholding CERCLA); *United States v. Bramble*, 103 F.3d 1475, 1482 (9th Cir. 1996) (upholding Eagle Protection Act); *Terry v. Reno*, 101 F.3d 1412, 1415-18 (D.C. Cir. 1996) (upholding FACE), *cert. denied*, 520 U.S. 1264, 117 S. Ct. 2431, 138 L.Ed.2d 193 (1997); *Proyect v. United States*, 101 F.3d 11, 12-14 (2d Cir. 1996)

(upholding Comprehensive Drug Abuse Prevention and Control Act); *United States v. McHenry*, 97 F.3d 125, 128-29 (6th Cir. 1996) (upholding the Anti Car Theft Act), *cert. denied*, 519 U.S. 1131, 117 S. Ct. 992, 136 L.Ed.2d 873 (1997); *United States v. Hampshire*, 95 F.3d 999, 1001-04 (10th Cir. 1996) (upholding Child Support Recovery Act), *cert. denied*, 519 U.S. 1084, 117 S. Ct. 753, 136 L.Ed.2d 690 (1997); *United States v. Kenney*, 91 F.3d 884, 889-91 (7th Cir. 1996) (upholding 18 U.S.C. § 922(o)); *United States v. Dinwiddie*, 76 F.3d 913, 920 (8th Cir.) (upholding FACE), *cert. denied*, —— U.S. ——, 117 S. Ct. 613, 136 L.Ed.2d 538 (1996).

Because it refuses to apply the rational basis standard, the majority fails to give appropriate deference to the abundant and well-supported congressional findings demonstrating that gender motivated violence has the requisite effect on interstate commerce. The majority itself acknowledges that "a healthy degree of judicial deference to reasonable legislative judgments of fact" is appropriate, but then asserts that the parties' invocation of rational basis review contemplates a "deference indistinguishable from judicial abdication," and refuses to defer *in any way* to the compelling findings here. *Ante*, at 857. Even if the parties have oversold the necessary deference, and that is not clear to me, a court must nonetheless defer to rational congressional findings. This is required because we are, as the Chief Justice explained, "not exercising a primary judgment," *Rostker*, 453 U.S. at 64, 101 S. Ct. 2646, but rather reviewing the "carefully considered decision of a coequal and representative branch of our Government," *Walters*, 473 U.S. at 319, 105 S. Ct. 3180. Deference to these legislative judgments, not disregard of them, constitutes the "paradigm of judicial restraint." *FCC v.*

Beach Communications, Inc., 508 U.S. 307, 314, 113 S. Ct. 2096, 124 L.Ed.2d 211 (1993). *Compare ante*, at 889-93 (Wilkinson, C.J., concurring).

Congressional findings are significant, not for some formalistic or procedural reason, *cf. ante*, at 844-50, but because they clearly state Congress's contemporaneous judgment as to the need, scope, and basis for the law that it is enacting. The statute itself articulates the *existence* of a congressional judgment of constitutionality, while findings articulate the *content* of that judgment. We defer to the former out of respect for the primary legislative power and sworn responsibility of Congress under the constitution, *Rostker*, 453 U.S. at 64, 101 S. Ct. 2646, and we grant an additional measure of deference to the latter in recognition of Congress's status as a coequal, deliberative body whose determinations are presumed to be rational, *Walters*, 473 U.S. at 319, 105 S. Ct. 3180. Where Congress has supported a statute with an explicitly articulated rationale asserting its constitutionality, therefore, invalidation of the statute constitutes not just the correction of a possibly inadvertent congressional overestimate of its competence, but rather a direct repudiation of Congress's full authority.

In *Lopez*, of course, the Court had no congressional findings to which to defer. But nothing in *Lopez* suggests that when Congress has considered a matter and made a rational finding of constitutionality—let alone an explicit finding based on a massive congressional record, as in this case—a court should not defer to that finding. On the contrary, the *Lopez* Court noted that consideration of congressional findings is "of course" part of the proper judicial inquiry. *Lopez*, 514 U.S. at 562, 115 S. Ct. 1624. In support of that statement, the

Lopez Court cited *Preseault*, 494 U.S. at 17, 110 S. Ct. 914, in which the Court expressly explained that "we must defer to a congressional finding that a regulated activity affects interstate commerce if there is any rational basis for such a finding." (internal quotation marks omitted).

Nonetheless, the majority suggests that the complete absence of congressional findings did not in any way impact the *Lopez* Court's decision to invalidate the GFSZA. *See ante*, at 845-50. The majority is almost forced to take this position because, if congressional findings are, as I believe, important, then the stunning lack of *any* findings supporting the GFSZA presents a formidable problem for the majority's position. In contrast to Subtitle C, in which Congress compiled an enormous factual record and left nothing to guess work, in the GFSZA Congress left everything—the necessity for the legislation, the rationale supporting it, the connection between gun possession near schools and interstate commerce, even the source of Congress's power—to conjecture.

The GFSZA was enacted as part of the Crime Control Act of 1990, Pub. L. No. 101-647, § 1702, 104 Stat. 4844. The House Report on the Crime Control Act states its purpose in the most general terms, as provision of "a legislative response to various aspects of the problem of crime in the United States." H.R.Rep. No. 101-681(I), at 69 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6472, 6473. This report does not even mention the GFSZA, let alone explain how possession of a gun within 1000 feet of a school affects interstate commerce. Congress held a single subcommittee hearing on GFSZA; witnesses testified as to "tragic instances of gun violence in our schools," but no one

mentioned "the effect of such violence upon interstate commerce"—not even a floor statement attempted to explain the constitutional basis for the statute. *United States v. Lopez*, 2 F.3d 1342, 1359 (5th Cir. 1993), *aff'd*, 514 U.S. 549, 115 S. Ct. 1624, 131 L.Ed.2d 626 (1995).

The lack of congressional findings served as the justification for the Fifth Circuit's refusal to uphold the GFSZA. *Id.* Although the Supreme Court did not affirm the Fifth Circuit on this basis, the Court did find the lack of legislative findings significant. First, the Court remarked on the Government's "conce[ssion] that '[n]either the statute nor its legislative history contain[s] express congressional findings.'" *Lopez*, 514 U.S. at 562, 115 S. Ct. 1624 (quoting Brief for United States at 5-6). Then the Court noted that although such findings "normally [are] not required," they do assist a court. *Id.* Such findings, the Court explained, "enable [a court] to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no substantial effect was visible to the naked eye." *Id.* at 563, 115 S. Ct. 1624.

Nevertheless, the majority maintains that the *Lopez* Court's "lucid recitation" of the "arguments" made by the Government and dissent in that case eliminated any need for congressional findings. *Ante*, at 846. Alternatively, the majority claims that if the *Lopez* Court's decision "turned on" the lack of congressional findings, it could and would have consulted findings that Congress made after the statute had been challenged. *Id.*

These contentions present multiple problems. If the Supreme Court truly regarded the lack of congressional findings in the GFSZA to be of no import, why did the Court comment on the assistance such legislative findings provide the judiciary? *See Lopez*, 514 U.S. at 562,

115 S. Ct. 1624. Why did the Court note the lack of findings in the GFSZA? *Id.* Why did the Court point out that the Government did "not rely upon[] subsequent [congressional] findings as a substitute *for the absence of findings in the first instance*?" *Id.* at 563 n. 4, 115 S. Ct. 1624 (emphasis added). And why did the Court also hold that it would not import "previous findings to justify" the GFSZA? *Id.* at 563, 115 S. Ct. 1624.

As indicated above, *supra*, at 923, congressional findings submitted upon passage of legislation simply are not the same as the arguments of lawyers, even government lawyers, after a law has been challenged in the courts. For example, in *United States v. Bass*, 404 U.S. 336, 92 S. Ct. 515, 30 L.Ed.2d 488 (1971), the government lawyers argued that in the Omnibus Crime Control and Safe Streets Act of 1968, Pub.L. No. 90-351, § 1202(a), 82 Stat. 197, 236 (1968), Congress validly exercised its Commerce Clause authority to criminalize possession of a firearm by a felon. Neither the statutory language nor any Congressional findings so stated. For this reason, the Supreme Court refused to "adopt this broad reading" of the statute and instead construed it to require a connection with interstate commerce. *Id.* at 339, 92 S. Ct. 515. However, the Court *expressly reserved the question* of whether the result would be different if Congress had made appropriate findings, noting that "[i]n light of our disposition of the case, we do not reach the question whether, upon *appropriate findings*, Congress can constitutionally punish the 'mere possession' of firearms." *Id.* n. 4, 92 S. Ct. 515 (emphasis added).

In sum, the Supreme Court has directed that, in deciding whether a statute was properly enacted under

the Commerce Clause, a court must apply a rational basis standard of judicial review, deferring—not abdicating but deferring—to rationally based congressional findings that the regulated activity substantially affects interstate commerce. This means that when Congress makes findings, a court carefully examines them, but only to determine if they have a rational basis. The sole ground for rejecting legislative findings is, therefore, that they lack *any* rational basis.[9]

In order to strike down Subtitle C, the majority must ignore our restricted role in assessing a challenge to Congress's Commerce Clause power, refuse to follow the prescribed rational basis standard of judicial review, and deny the deference due to Congress's clear and amply supported findings.

3.

Finally, the majority errs by profoundly misunderstanding the nature and extent of the proper limits

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[9] Post-*Lopez*, our sister circuits have often reiterated that "court[s] must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding." *Terry*, 101 F.3d at 1416; *accord Proyect*, 101 F.3d at 12-13; *United States v. McKinney*, 98 F.3d 974, 979 (7th Cir. 1996); *Hampshire*, 95 F.3d at 1004; *United States v. Kim*, 94 F.3d 1247, 1250 (9th Cir. 1996); *United States v. Bishop*, 66 F.3d 569, 576-77 (3d Cir. 1995); *Cheffer v. Reno*, 55 F.3d 1517, 1520-21 (11th Cir. 1995); *see also Knutson*, 113 F.3d at 29-31 (upholding 18 U.S.C. § 922(o) solely on the basis of "congressional findings" and noting that *Lopez* "made clear that federal Commerce Clause legislation continues to merit a high degree of judicial deference"); *United States v. Monteleone*, 77 F.3d 1086, 1091-92 (8th Cir. 1996) (upholding 18 U.S.C. § 922(d) on the basis of "explicit Congressional findings"). Moreover, in *Leshuk*, 65 F.3d at 1112, this court upheld the Comprehensive Drug Abuse Prevention and Control Act principally on the basis of Congress's detailed findings.

imposed by federalism concerns on Congress's commerce power. Whether considered as part of the substantially affects tests, *see Lopez*, 514 U.S. 549, 115 S. Ct. 1624 (1995), or as a separate inquiry, *see New York v. United States*, 505 U.S. 144, 112 S. Ct. 2408, 120 L.Ed.2d 120 (1992), federalism concerns do not justify invalidation of Subtitle C. The Founders provided Congress with a broad and far-ranging power to regulate interstate commerce, but they restrained that power by locating it within an explicit constitutional system that depends upon two spheres of government—state and federal—to represent the interests of, and be accountable to, the people. The majority disregards this careful scheme of structural limitations and seeks to place additional and unprecedented constraints on Congress. Subtitle C, which legislates in an area of traditional congressional expertise, and does not interfere with or usurp any state authority, fits comfortably within the proper federalism-based limits on Congress's Commerce Clause power.

The Constitution allocates to Congress the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. 1, § 8, cl. 3. The Founders intended this power to be extensive in order to remedy the "defect of power in the existing Confederacy to regulate the commerce between its several members." The *Federalist* No. 42, at 267 (James Madison) (Clinton Rossiter ed., 1961). From the outset, the Supreme Court recognized the extent of this power, holding it "complete in itself," and to "be exercised to its utmost extent." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196, 6 L.Ed. 23 (1824). This statement of Chief Justice Marshall in *Ogden* is "understood now as an early and authoritative recognition that the Commerce Clause grants Congress extensive power and ample discretion to determine its appropriate exercise." *Lopez*, 514 U.S. at 568, 115 S. Ct. 1624 (Kennedy, J., concurring). At the same time, however, the Founders established judicially-enforceable limits on Congress's commerce authority.

The most important of these, and the one at issue here, is the limit arising from the structure of the government established by the Constitution—a federal government composed of sovereign states. In *Ogden* itself, Chief Justice Marshall recognized that the central structural concern in Commerce Clause cases is the capacity of different government entities to represent the interests of the people:

> If, as has always been understood, the sovereignty of congress, though limited to specific objects, is plenary as to those objects, the power over commerce . . . is vested in congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States. The wisdom and the discretion of congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from abuse. They are the restraints on which the people must often rely solely, in all representative governments.

Gibbons, 22 U.S. at 197. Far from disavowing this principle, the Supreme Court in modern times has expressly embraced it:

> [T]he fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect "States as States" is one of process rather than one of result. Any substantive restraint on the exercise of the Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a "sacred province of state autonomy."

Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 554, 105 S. Ct. 1005, 83 L.Ed.2d 1016 (1985).[10] Chief

[10] The majority scolds me for citing and quoting *Garcia v. San Antonio Metro. Transit*, 469 U.S. 528, 105 S. Ct. 1005, 83 L.Ed.2d 1016 (1985), because then-Justice Rehnquist and Justice O'Connor, in their dissents in that case, predicted that it would one day be overruled so that the Court could resume its "constitutional responsibility to oversee the Federal Government's compliance with its duty to respect the legitimate interests of the States." *Ante*, at 861 (quoting *Garcia*, 469 U.S. at 589, 105 S. Ct. 1005 (O'Connor, J., dissenting)) (internal quotation marks omitted). *Garcia*, however, remains the law of the land, and treating it as such hardly constitutes "quaint innocence." *Ante* at 860. Furthermore, the emphasis placed on political accountability in cases like *New York* and *Printz v. United States*, 521 U.S. 98, 117 S. Ct. 2365, 138 L.Ed.2d 914 (1997), conclusively demonstrates that the political process concerns articulated in *Garcia* have in fact proved to be more accommodating of an effective judicial role in protecting federalism than they initially appeared to be. Far from being "in blissful denial of the Court's most recent precedents on Our Federalism," *ante*, at 860, therefore, faithful adherence to those precedents requires courts to choose an approach deriving from considerations of representative authority and political process over a categorical approach of the sort that the majority adopts today. Finally, and most importantly, the majority's criticism of my use of *Garcia* rests on a fundamental misrepresentation of my position. Whatever the legal or totemic significance of *Garcia*, I nowhere

Justice Marshall and the *Garcia* Court thus explained that, because our government is a representative one, limits on a power as broad and important as that conferred by the Commerce Clause normally must come from the Congress, which is constitutionally designed to respond most sensitively to the will of the people, rather than from the unelected federal judiciary.

But neither in the nineteenth nor in the twentieth century has the Supreme Court counseled absolute judicial acquiescence to Congress's Commerce Clause legislation. Although, as Justice Marshall's language in *Ogden* implies, 22 U.S. at 197, Congress's capacity to represent "the people" is inherently superior to that of the courts, it is not inherently superior to that of state legislatures. The rationale for judicial deference to Commerce Clause legislation does not, therefore, apply as strongly to cases involving *conflicts* between federal and state authority as it does to cases in which a court has only its own view of what appropriately falls within the commerce power upon which to rely.

For this reason, courts reviewing Commerce Clause legislation may appropriately take the relative representative abilities of the states and the federal government into account. Matters in which states may have the representational advantage include those in which community standards necessarily shape official regula-

maintain, and this dissent cannot fairly be read even to suggest, that "Congress alone is constitutionally responsible for the protection of the sovereign States." *Ante*, at 860. Rather, I repeatedly and expressly recognize that the courts, and not just Congress, have a definite obligation to ensure that our federal structure remains intact. *See supra*, at 925-26, and *infra*, at 926-28, 929-30, 932.

tion and those in which the development of a variety of approaches is preferable to a uniform national scheme. *See, e.g., Gregory*, 501 U.S. at 458, 111 S. Ct. 2395 (noting that our federal structure makes government more "sensitive to the needs of a heterogeneous society" and "allows for [] innovation and experimentation in government"). Of course, dormant Commerce Clause doctrine teaches that a uniform national scheme must always be preferred with respect to regulations of certain kinds, and *Lopez* similarly suggests that when Congress regulates with respect to "commercial concerns that are central to the Commerce Clause," inevitably it is regulating activity that has a substantial effect on interstate commerce. *Lopez*, 514 U.S. at 583, 115 S. Ct. 1624 (Kennedy, J., concurring).[11]

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[11] Thus, not only is federal regulation of this kind constitutional under the affirmative Commerce Clause, but also state regulation of this sort, if it benefits in-state interests and burdens out-of-state interests, is prohibited by the dormant Commerce Clause. A court reviewing such federal regulation need not weigh the representative capacity of a state legislature against that of Congress because, as the dormant Commerce Clause teaches, the value of state representative authority could not, in those circumstances, outweigh the value of national uniformity. A court, therefore, need only consider whether the states are better suited than Congress to regulate a certain subject if the states would be permitted to discriminate in favor of their own residents in regulating that subject. It is solely in this context—that of identifying the class of cases in which a court can consider the possible representative superiority of the states—that the question of whether the regulated activity is sufficiently commercial or "economic" becomes relevant. Contrary to the majority's assertions, there is no rule that Congress is prohibited from ever using the commerce power to regulate certain subjects—for example, activities that the majority categorizes as "non-economic"—just because they are not at the core of the Commerce Clause.

Another, more fundamental aspect of the judicially-enforceable limitation on the commerce power is a court's duty to ensure the proper functioning of the constitutional mechanisms that preserve the representative authority of the states within the national political process. *See Garcia*, 469 U.S. at 554, 105 S. Ct. 1005. The Supreme Court's decision in *New York*, 505 U.S. 144, 112 S. Ct. 2408 (1992), represents an application of this principle. In that case, the Court struck down legislation designed to coerce states into regulating the disposal of radioactive waste in a particular fashion. The Court found the legislation unconstitutional in order to compensate for a possible failing in the national political process. By offering both state and federal officials a way to address the problem of toxic waste disposal without taking full responsibility for the unpopular task of selecting particular disposal sites, the challenged statute "raise[d] the possibility that powerful incentives might lead both federal and state officials to view departures from the federal structure to be in their personal interests." *Id.* at 182, 112 S. Ct. 2408. Moreover, by obscuring accountability for the selection of disposal sites, the statute dampened the incentives that would otherwise operate to encourage these officials to protect state interests.

The *New York* Court recognized that the effectiveness of both state and federal governments as representative bodies suffers when citizens are confused about which sphere of government is responsible for the regulation of an activity. *Id.* at 168, 112 S. Ct. 2408. The problem of political accountability will be most acute when, as with the statute at issue in *New York*, the federal government has effectively commandeered state authority:

> [W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.

Id. at 169, 112 S. Ct. 2408. The representative effectiveness of state and federal governments would also be impaired if "the Federal Government [were] to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities," because in this situation "the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory." *Lopez*, 514 U.S. at 577, 115 S. Ct. 1624 (Kennedy, J., concurring).

Lopez, like New York, seeks to preserve the efficacy of both the states and the federal government as representative bodies. Seen in the broader context of the Supreme Court's decisions addressing federalism and the commerce power, *Lopez* stands for the proposition that Commerce Clause legislation may be unconstitutional if it directly supersedes official state action in an area of traditional state concern. In these circumstances, political accountability is definitively disrupted, the value of local expertise is lost, and the

benefits of the development of a variety of approaches to a problem are forfeited.[12]

Despite its zeal to protect the rights of the states in the federal system, the majority utterly fails to recognize and respect these genuine federalism-based limitations. Instead it imposes its own unprecedented, formalistic limits on Congress's commerce power. In

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[12] As Justice Kennedy suggested in *Lopez*, 514 U.S. at 577, 115 S.Ct. 1624, history may often be relevant in determining whether a statute will impermissibly blur the lines of political accountability; the likelihood that citizens will become confused regarding which sphere of government is responsible for regulation of an activity will depend in part on which sphere has traditionally controlled it. History can also be a guide to the identification of areas in which states may be superior to Congress as representative entities. However, courts should not, indeed cannot, rule an act of Congress unconstitutional just because it regulates a matter historically governed by the states. Congress undeniably has the power to legislate in areas traditionally controlled by the states. *See Gregory*, 501 U.S. at 460, 111 S. Ct. 2395. Moreover, as the Supreme Court has observed in the context of state immunity, history cannot reasonably be made dispositive on questions of federalism:

> The most obvious defect of a historical approach to state immunity is that it prevents a court from accommodating changes in the historical functions of States. . . . At the same time, the only apparent virtue of a rigorous historical standard, namely, its promise of a reasonably objective measure for state immunity, is illusory. Reliance on history as an organizing principle results in line-drawing of the most arbitrary sort; the genesis of state governmental functions stretches over a historical continuum from before the Revolution to the present, and courts would have to decide by fiat precisely how longstanding a pattern of state involvement had to be for federal regulatory authority to be defeated.

Garcia, 469 U.S. at 543-44, 105 S. Ct. 1005. The same principles apply here.

addition to its rule about economic activities and jurisdictional elements, the majority holds that Commerce Clause legislation is unconstitutional unless the rationale connecting the regulated activity to commerce contains a "principled" limitation. *Lopez* requires imposition of such a limitation, the majority argues, because without it Congress's commerce power would become an unbridled police power. This argument fails on several grounds.

First, contrary to the majority's suggestion, neither *Lopez* nor any other Supreme Court case mandates such a holding. Certainly the *Lopez* Court found the lack of such limitations in the rationale supporting the GFSZA to be *one* of the factors militating against its constitutionality. 514 U.S. at 564-67, 115 S. Ct. 1624. But the Court never held that this characteristic was, in itself, sufficient to justify invalidation.

Second, the majority's requirement that Congress's Commerce Clause legislation must be supported by a rationale with limits—one that renders some class of significant activity beyond Congress's reach—would permit courts to shirk their duty to make reasoned decisions. If a court were allowed to strike down a statute based solely on the principle that *something* must fall outside the scope of Congress's rationale for enacting the statute, then a court would be free of the responsibility to provide substantive reasons as to why or how that *particular* statute exceeds Congress's authority. The Supreme Court has expressly criticized its own prior use of an approach that permitted this kind of decisionmaking:

> Although the need to reconcile state and federal interests obviously demanded that state immunity have some limiting principle, the Court did not try to justify the particular result it reached; it simply concluded that "a line [must] be drawn" and proceeded to draw that line. . . . This inability to give principled content . . . no less significantly than its unworkability, led the Court to abandon the distinction. . . .

Garcia, 469 U.S. at 543, 105 S. Ct. 1005 (citations omitted). The majority's approach would permit cases to be decided based on this same empty principle that "a line must be drawn"; courts would not, under this approach, even be required to articulate where the line lies, or why it is there.

Moreover, we certainly may not, and *Lopez* does not hold that we can, strike down legislation that does not significantly interfere with state authority solely because Congress could someday enact more invasive legislation on the same reasoning as that advanced to support the statute in question. A court reviewing the constitutionality of legislation should base its decision primarily on the operation of a statute at hand, not on its belief in the unconstitutionality of another, hypothetical statute or series of statutes. *Cf. Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549, 569, 67 S. Ct. 1409, 91 L.Ed. 1666 (1947) ("constitutional issues affecting legislation will not be determined . . . in advance of the necessity of deciding them" or "in broader terms than are required by the precise facts to which the ruling is to be applied"); *Alabama State Fed'n of Labor v. McAdory*, 325 U.S. 450, 461, 65 S. Ct. 1384, 89 L.Ed. 1725 (1945) (noting Supreme Court's long practice of refusing to decide "abstract, hypothetical, or contingent questions, or to decide any constitutional question in advance of the necessity for its decision, or to formulate a rule of constitutional law

broader than is required by the precise facts to which it is to be applied, or to decide any constitutional question except with reference to the particular facts to which it is to be applied" (citations omitted)). Courts must of course consider the implications that the statute before them may have for the federal structure established by the Constitution. But as explained earlier, and as cases such as *Lopez* and *New York* indicate, courts should only strike down legislation to protect federalism if there is some reason to believe that the representative authority of the states has been or will be unconstitutionally impaired.

Furthermore, the availability of the judicially-enforceable limitations on the commerce power, which I have described above, fatally undermines the basic premise of the majority's approach. It simply is not the case that, without its new "principled limitations" requirement, Congress would have carte blanche to regulate any activity and thereby to obliterate the division of power between the national government and the states. Well established federalism-based limits on the commerce power exist to preserve the union of independent states.

Federalism concerns already empower courts to invalidate Congressional legislation that severely interferes with the national political process, such as legislation that seriously impairs accountability by commandeering state regulatory authority for federal purposes. *See Printz v. United States*, 521 U.S. 98, 117 S. Ct. 2365, 138 L.Ed.2d 914 (1997); *New York*, 505 U.S. 144, 112 S. Ct. 2408 (1992). Federalism concerns also authorize courts to strike certain legislation even if it interferes with the political process less severely. *See Lopez*, 514 U.S. at 583, 115 S. Ct. 1624 (Kennedy, J., concurring).

For example, statutes that *directly supersede* official state action in an area of *traditional state concern* are constitutionally suspect. *See Lopez*, 514 U.S. at 561 n. 3, 564, 115 S. Ct. 1624; *id.* at 580-83, 115 S. Ct. 1624 (Kennedy, J., concurring). This is so because such statutes significantly interfere with political accountability, and because regulation in an area of traditional state concern raises the question of whether the states may be better representatives of the people than the federal government, with respect to the regulated activity. When a federal statute directly supersedes official state action in an area of traditional state concern, then (and only then) may a court properly consider whether the rationale supporting the statute contains an inherent limiting principle. *Cf. id.* at 564-66, 115 S. Ct. 1624. In such circumstances, the danger that the approval of the statute would give Congress the power (in theory) to eliminate the distinction between federal and state government has more substance. Even statutes that lack such a limiting principle, however, should not be struck down categorically in order to satisfy "abstract notions" of theory or propositional logic, as the majority is so eager to do; rather, such statutes should be evaluated through the exercise of the kind of "practical judgment" that the Supreme Court has expressly advised courts to use in Commerce Clause cases, *see, e.g.*, *Polish Nat'l Alliance v. NLRB*, 322 U.S. 643, 650, 64 S. Ct. 1196, 88 L.Ed. 1509 (1944), and that the *Lopez* Court itself employed, *see, e.g.*, 514 U.S. at 567, 115 S. Ct. 1624 (noting, with respect to the principles that guide Commerce Clause adjudication, that "[t]hese are not precise formulations, and in the nature of things they cannot be").

When these principles are applied to Subtitle C, the question of its constitutionality is not a close one; Subtitle C fits easily within these federalism-based limitations on Congress's power.

First, Subtitle C does not directly—or indirectly—obscure the lines of political accountability or supersede any state action. It obviously does not interfere with official state action in the way that the GFSZA did. The *Lopez* Court noted that "[u]nder our federal system, the 'States possess primary authority for defining and enforcing the criminal law.' . . . When Congress criminalizes conduct already denounced as criminal by the States, it effects a 'change in the sensitive relation between federal and state criminal jurisdiction.'" *Lopez*, 514 U.S. at 561 n. 3, 115 S. Ct. 1624 (quoting *Brecht v. Abraham*, 507 U.S. 619, 635, 113 S. Ct. 1710, 123 L.Ed.2d 353 (1993), and *United States v. Enmons*, 410 U.S. 396, 411-12, 93 S. Ct. 1007, 35 L.Ed.2d 379 (1973)). The GFSZA disrupted the federal-state balance by giving federal officials the power to override a state prosecutor's decision not to pursue a case, as well as the power to interfere with a state prosecution by initiating a virtually identical federal action. Subtitle C, in contrast, is not a criminal statute, displaces no state criminal law, and permits no such interference with official state action.[13]

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[13] Because Subtitle C is not a criminal statute, reliance on and analogy to the cost of crime rationale that was rejected in *Lopez* is misplaced. *See ante*, at 838-40; 901-02 (Niemeyer, J., concurring). Congress did not attempt to justify its enactment of Subtitle C with vague references to the high cost of crime. Rather, Congress's enactment of Subtitle C was firmly rooted in rational findings, based on abundant evidence, that violence caused by gender animus substantially affects interstate commerce.

Nor, contrary to the majority's contentions, does Subtitle C directly supersede or impermissibly infringe on the states' authority to regulate family law matters. Domestic matters may be addressed in some cases brought under Subtitle C, but no state or official regulation is superseded as a result. Instead, Congress expressly limited the reach of Subtitle C in deference to traditional areas of state expertise on family law matters. *See* 42 U.S.C. § 13981(e)(4) (statute confers no "jurisdiction over any State law claim seeking the establishment of a divorce, alimony, equitable distribution of marital property, or child custody decree.").

Moreover, nothing in Subtitle C otherwise supersedes or interferes with official state regulation. Victims of gender-based violence remain free to press state criminal charges and pursue state tort remedies, and states remain free to treat such claims as they will. In fact, far from displacing state law, Congress carefully designed Subtitle C to harmonize with state law and to protect areas of state concern. Subtitle C not only expressly deprives federal courts of any jurisdiction over state law domestic relations claims, 42 U.S.C. § 13981(e)(4); it also specifically references state criminal laws in defining a "crime of violence," 42 U.S.C. § 13981(d)(2) ("crime of violence" defined as "an act or series of acts that would constitute a felony against the person or that would constitute a felony against property if the conduct presents a serious risk of physical injury to another, and that would come within the meaning of *State* or Federal offenses described in section 16 of Title 18." (emphasis added)).

Subtitle C thus acts to supplement, rather than supplant, state law. The states may still "experiment[] to devise various solutions" to the problems of gender-

based violence. *Lopez*, 514 U.S. at 581, 115 S. Ct. 1624 (Kennedy, J., concurring). Subtitle C simply provides victims of such violence with an independent, federal civil rights remedy as an alternative means of recovering the damages they incur.

Furthermore, Subtitle C does not regulate in an area traditionally controlled by the states, like criminal justice, as the GFSZA did.

Rather, Subtitle C governs an area—civil rights—that has been a critically important federal responsibility since shortly after the Civil War. Consequently, no problems of political accountability lurk in the implementation of Subtitle C.

Indeed, federal action is particularly appropriate when, as here, there is persuasive evidence that the states have not adequately protected the rights of a class of citizens. In passing Subtitle C, Congress made extensive and convincing findings that state law had failed to successfully address gender-motivated violence. Congress concluded that:

> Other State remedies have proven inadequate to protect women against violent crimes motivated by gender animus. Women often face barriers of law, of practice, and of prejudice not suffered by other victims of discrimination. Traditional State law sources of protection have proved to be difficult avenues of redress for some of the most serious crimes against women. Study after study has concluded that crimes disproportionately affecting women are often treated less seriously than crimes affecting men. Collectively, these reports provide overwhelming evidence that gender bias permeates

> the court system and that women are most often its victims.

S. Rep. No. 103-138, at 49 (footnotes omitted).[14]

Congress further noted that "[e]ach and every one of the existing civil rights laws covers an area in which some aspects are also covered by State laws. What State laws do not provide, and cannot provide by their very nature, is a national antidiscrimination standard." S. Rep. No. 102-197, at 49. In Subtitle C, Congress acted in a paradigmatic area of federal expertise and passed a civil rights law in response to "existing bias

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[14] The studies referred to in the above quotation were largely state-sponsored, including the following: Administrative Office of the California Courts Judicial Counsel, *Achieving Equal Justice for Women and Men in the Courts* (1990); Colorado Supreme Court Task Force on Gender Bias in the Courts, *Gender & Justice in the Colorado Courts* (1990); *Connecticut Task Force on Gender Justice and the Courts* (1991); Florida Supreme Court Gender Bias Study Commission, *Report* (1990); Supreme Court of Georgia, *Gender and Justice in the Courts* (1991); Illinois Task Force, *Gender Bias in the Courts* (1990); Maryland Special Joint Committee, *Gender Bias in the Courts* (1989); Massachusetts Supreme Judicial Court, *Gender Bias Study of the Court System in Massachusetts* (1989); Michigan Supreme Court Task Force on Gender Issues in the Courts, *Final Report* (1989); Minnesota Supreme Court Task Force for Gender Fairness in the Courts, *Final Report* (1989); Nevada Supreme Court Gender Bias Task Force, *Justice For Women* (1989); New Jersey Supreme Court Task Force, *Women in the Courts* (1984); New York Task Force on Women in the Courts, *Report* (1986); *Rhode Island Supreme Court Committee on Women in the Courts* (1987); Utah Task Force on Gender and Justice, *Report to the Utah Judicial Council* (1990); Vermont Supreme Court and Vermont Bar Association, *Gender and Justice: Report of the Vermont Task Force on Gender Bias in the Legal System* (1991); Washington State Task Force, *Gender and Justice in the Courts* (1989); Wisconsin Equal Justice Task Force, *Final Report* (1991). *See* S. Rep. No. 103-138, at 49 n.52.

and discrimination in the criminal justice system." H.R. Conf. Rep. No. 103-711, at 385.

Not only did extensive objective evidence support Congress's conclusion that the states could not effectively deal with the pervasive problem of gender-based violence, but state officials themselves confirmed the inability of the states to handle the problem. Indeed, nothing more clearly illustrates the basic difference between Subtitle C and the GFSZA than the fact that Subtitle C responded to the states' self-described needs, while the GFSZA added a redundant layer of federal regulation in an area where most states had already acted.

Before Congress ever enacted the GFSZA, 40 states had already effectively addressed possession of guns near schools and, in fact, had enacted criminal statutes outlawing the very behavior made a federal crime in the GFSZA, *Lopez*, 514 U.S. at 581, 115 S. Ct. 1624 (Kennedy, J., concurring); indeed, Lopez himself was originally arrested by state authorities and charged with a state crime. In sharp contrast, prior to the enactment of VAWA, 41 Attorneys General from 38 states (including Virginia), the District of Columbia, and two territories, urged Congress to enact the legislation, explaining that the states had been unable to solve the problems arising from gender-animated violence. *See Crimes of Violence Motivated by Gender: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 103d Cong. 34-36 (1993) (Letter from Attorneys General). The highest law enforcement officer in each of these jurisdictions told Congress: "Our experience as attorneys general strengthens our belief that the problem of violence against women is a

national one, requiring federal attention, federal leadership, and federal funds." *Id.*; *see also Women and Violence: Hearing before the Senate Comm. on Judiciary*, 101st Cong. 137-56 (1990) (noting pervasive nature of this problem in both rural and urban areas).

When there has been, as there was here, a "demonstrated state failure" to deal with a problem, Congress would even be justified, as the Chief Justice has recently noted, in federalizing state *crimes*. *See* Chief Justice William H. Rehnquist, *1998 Year-End Report on the Federal Judiciary* (January 1999).[15] Thus, Congress was certainly justified in concluding that gender-based violence qualified as a problem for which national civil rights legislation was preferable to a variety of failed state approaches.

The majority disregards this evidence in favor of its own conception of the states' needs, and ignores the structural limitations inherent in our federal system in

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[15] The majority quotes the Chief Justice's criticism, in 1991, of the civil rights provision of VAWA as it had been proposed at that time. *Ante* at 842. That criticism pertained to an earlier, very different version of the statute, and it has not been reiterated since Subtitle C was enacted in its current form. The majority also notes that last year the Chief Justice included VAWA in a list of statutes whose enactment he regarded as bad policy. *Id.*, at 842-43 n. 12. The Chief Justice's most recent Year-End Report, however, suggests that this discomfort with VAWA primarily pertains not to VAWA's civil rights provision, but rather to its criminal provisions, which constitute part of the trend "to federalize crimes." Chief Justice William H. Rehnquist, *1998 Year-End Report on the Federal Judiciary* (January 1999). Moreover, as noted in text above, the Chief Justice has expressly recognized that "demonstrated state failure"—a consideration that Congress plainly relied upon in enacting Subtitle C—makes even the federalization of state crimes acceptable. *Id.*

favor of its own categorical and unprecedented limits on Congress's power. It must do so in order to find that federalism concerns require the invalidation of Subtitle C. In fact, no federalism concerns require this result: Subtitle C does not supersede or intrude on any state powers, nor does it regulate in any area of traditional state concern. Rather, Subtitle C governs civil rights, a traditional subject of federal regulation, and provides a necessary national remedy for a severe problem that the states have, by their own admission, been unable to address effectively.

D.

The proper judicial role in commerce power cases certainly does not permit courts to surrender responsibility for safeguarding federalism to Congress. Nor does it require courts to simply stand and watch while Congress federalizes whole areas of law traditionally regulated by the states. It does, however, strictly confine a court's ability to strike down an act of Congress based on judgments of a kind that an unrepresentative body is ill-equipped to make.

History and precedent demonstrate that courts are not adept in formulating rules that limit the commerce power by guaranteeing a sphere of governmental authority to the states. In order to create and enforce such rules, judges inevitably rely, as my colleagues in the majority do, upon their own conception of "what is truly national and what is truly local." *Lopez*, 514 U.S. at 567-68, 115 S. Ct. 1624.

This approach directly contradicts the principles that identify a court's proper role. More than fifty years ago, the Supreme Court explained that the determina-

tion of whether an activity sufficiently affects interstate commerce

> is a matter of practical judgment, not to be determined by abstract notions. The exercise of this practical judgment the Constitution entrusts primarily and very largely to the Congress, subject to the latter's control by the electorate. Great power was thus given to the Congress: the power of legislation and thereby the power of passing judgment upon the needs of a complex society. Strictly confined though far reaching power was given to this Court: that of determining whether the Congress has exceeded limits allowable in reason for the judgment which it has exercised.

Polish Nat'l Alliance, 322 U.S. at 650, 64 S. Ct. 1196. The majority, of course, rejects a "strictly confined" judicial role. Instead, it would have courts substitute their own "abstract notions" about the proper allocation of power between the federal and state governments for the "practical judgment" that emerges from the political and legislative processes. This approach not only inflates judicial authority, it also demeans the constitutional structure, derogates congressional integrity and decisionmaking, and underestimates state power.

Even more disturbingly, the majority's ruling undermines the fundamental principle of the government under which the federal courts were created: that the people, through the mechanisms and within the limits described in the Constitution, have the ultimate authority to determine how they are to be governed. The majority today does not act to protect the rights of people underrepresented by the mechanisms of government. Rather, the majority seeks, in the name of "the

People," to defend the states. Both the states and the people, however, are represented in the federal legislative process. Moreover, they are represented through mechanisms that, both practically and constitutionally, are far better designed than is the judiciary to protect their interests in preventing an improper distribution of power between the national government and the states.

My colleagues in the majority iterate and reiterate that the enumeration of powers in the Constitution reserves authority to the states, that ours is a system of dual sovereignty, and that the states must operate as independent governmental bodies for that system to continue to exist. No one doubts the validity of any of these principles. The critical question, however, is who decides how they are to be upheld.

The Constitution itself provides a clear and specific answer to that question. It gives the fundamental power of government—the power of legislation—to Congress. Congress is not some central dictatorial assembly with interests independent of and antithetical to those of the states. Rather, Congress is composed entirely of members elected from each state to represent the interests of the people of that state, and is specifically designed to preserve state authority and protect state interests. Congressional legislation accordingly is not, as the majority suggests, a command from an autonomous central power to totally subjugated states. Congressional legislation is instead the product of the constitutionally coordinated authorities of the states, the localities, and the people. Courts thus have slender authority to invalidate the result of Congress's legislative process in order to protect the states

or localities, unless there is some reason to suspect that the legislative process has been or will be unreliable.

The majority believes that we, the judiciary, know best when it comes to deciding which level of government can enact certain legislation; in essence, the majority's ruling today seeks to defend the states and the people against themselves in order to enforce its own understanding of what the federal government can properly do, and what must be left to the states. When federal courts undertake responsibility of this kind without specific constitutional support, the threat to our system of government is grave indeed.

Judges Murnaghan, Ervin, and Michael have authorized me to indicate that they join in this dissent.

FILED

JUN 25 1999

OFFICE OF THE CLERK

No. 98-5

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ANTONIO J. MORRISON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI (VOLUME 2)

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APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 96-1814, 96-2316

CHRISTY BRZONKALA, PLAINTIFF-APPELLANT

v.

VIRGINIA POLYTECHNIC INSTITUTE
AND STATE UNIVERSITY; ANTONIO J. MORRISON;
JAMES LANDALE CRAWFORD,
DEFENDANTS-APPELLEES

AND

CORNELL D. BROWN; WILLIAM E. LANDSIDLE,
IN HIS CAPACITY AS COMPTROLLER OF THE
COMMONWEALTH, DEFENDANTS

LAW PROFESSORS; VIRGINIANS ALIGNED AGAINST SEXUAL ASSAULT; THE ANTI-DEFAMATION LEAGUE; CENTER FOR WOMEN POLICY STUDIES; THE D.C. RAPE CRISIS CENTER; EQUAL RIGHTS ADVOCATES; THE GEORGETOWN UNIVERSITY LAW CENTER SEX DISCRIMINATION CLINIC; JEWISH WOMEN INTERNATIONAL; THE NATIONAL ALLIANCE OF SEXUAL ASSAULT COALITIONS; THE NATIONAL COALITION AGAINST DOMESTIC VIOLENCE; THE NATIONAL COALITION AGAINST SEXUAL ASSAULT; THE NATIONAL NETWORK TO END DOMESTIC VIOLENCE; NATIONAL ORGANIZATION FOR WOMEN; NORTHWEST WOMEN'S LAW CENTER; THE PENNSYLVANIA COALITION AGAINST DOMESTIC VIOLENCE, INCORPORATED; VIRGINIA NATIONAL ORGANIZATION FOR WOMEN; VIRGINIA NOW LEGAL DEFENSE AND EDUCATION

FUND, INCORPORATED; WOMEN EMPLOYED; WOMEN'S LAW PROJECT; WOMEN'S LEGAL DEFENSE FUND; INDEPENDENT WOMEN'S FORUM; WOMEN'S FREEDOM NETWORK, AMICI CURIAE

UNITED STATES OF AMERICA,
INTERVENOR-APPELLANT

AND

CHRISTY BRZONKALA, PLAINTIFF

v.

ANTONIO J. MORRISON; JAMES LANDALE
CRAWFORD, DEFENDANTS-APPELLEES

AND

VIRGINIA POLYTECHNIC INSTITUTE AND STATE
UNIVERSITY; CORNELL D. BROWN; WILLIAM E.
LANDSIDLE, IN HIS CAPACITY AS COMPTROLLER OF THE
COMMOWEALTH, DEFENDANTS

LAW PROFESSORS; VIRGINIANS ALIGNED AGAINST SEXUAL ASSAULT; THE ANTI-DEFAMATION LEAGUE; CENTER FOR WOMEN POLICY STUDIES; THE D.C. RAPE CRISIS CENTER; EQUAL RIGHTS ADVOCATES; THE GEORGETOWN UNIVERSITY LAW CENTER SEX DISCRIMINATION CLINIC; JEWISH WOMEN INTERNATIONAL; THE NATIONAL ALLIANCE OF SEXUAL ASSAULT COALITIONS; THE NATIONAL COALITION AGAINST DOMESTIC VIOLENCE; THE NATIONAL COALITION AGAINST SEXUAL ASSAULT; THE NATIONAL NETWORK TO END DOMESTIC VIOLENCE; NATIONAL ORGANIZATION FOR WOMEN; NORTHWEST WOMEN'S LAW CENTER; THE PENNSYLVANIA COALITION AGAINST DOMESTIC VIOLENCE, INCORPORATED; VIRGINIA NATIONAL ORGANIZATION

FOR WOMEN; VIRGINIA NOW LEGAL DEFENSE AND EDUCATION FUND, INCORPORATED; WOMEN EMPLOYED; WOMEN'S LAW PROJECT; WOMEN'S LEGAL DEFENSE FUND; INDEPENDENT WOMEN'S FORUM; WOMEN'S FREEDOM NETWORK, AMICI CURIAE

[Argued: June 4, 1997]

[Decided: Dec. 23, 1997]

OPINION

Before: HALL, LUTTIG, and MOTZ, Circuit Judges.

DIANA GRIBBON MOTZ, Circuit Judge:

This case arises from the gang rape of a freshman at the Virginia Polytechnic Institute by two members of the college football team, and the school's decision to impose only a nominal punishment on the rapists. The victim alleges that these rapes were motivated by her assailants' discriminatory animus toward women and sues them pursuant to the Violence Against Women Act of 1994. She asserts that the university knew of the brutal attacks she received and yet failed to take any meaningful action to punish her offenders or protect her, but instead permitted a sexually hostile environment to flourish; she sues the university under Title IX of the Education Amendments of 1972. The district court dismissed the case in its entirety. The court held that the complaint failed to state a claim under Title IX and that Congress lacked constitutional authority to enact the Violence Against Women Act. Because we believe that the complaint states a claim under Title IX

and that the Commerce Clause provides Congress with authority to enact the Violence Against Women Act, we reverse and remand for further proceedings.

I.

Christy Brzonkala entered Virginia Polytechnic Institute ("Virginia Tech") as a freshman in the fall of 1994.[1] On the evening of September 21, 1994, Brzonkala and another female student met two men who Brzonkala knew only by their first names and their status as members of the Virginia Tech football team. Within thirty minutes of first meeting Brzonkala, these two men, later identified as Antonio Morrison and James Crawford, raped her.

Brzonkala and her friend met Morrison and Crawford on the third floor of the dormitory where Brzonkala lived. All four students talked for approximately fifteen minutes in a student dormitory room. Brzonkala's friend and Crawford then left the room.

Morrison immediately asked Brzonkala if she would have sexual intercourse with him. She twice told Morrison "no," but Morrison was not deterred. As Brzonkala got up to leave the room Morrison grabbed her, and threw her, face-up, on a bed. He pushed her down by the shoulders and disrobed her. Morrison turned off the lights, used his arms to pin down her elbows and pressed his knees against her legs. Brzon-

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[1] "On appeal from an order granting a motion to dismiss under Fed. R. Civ. P. 12(b)(6), we accept as true the facts alleged in the complaint." *McNair v. Lend Lease Trucks, Inc.*, 95 F.3d 325, 327 (4th Cir.1996).

kala struggled and attempted to push Morrison off, but to no avail. Without using a condom, Morrison forcibly raped her.

Before Brzonkala could recover, Crawford came into the room and exchanged places with Morrison. Crawford also raped Brzonkala by holding down her arms and using his knees to pin her legs open. He, too, used no condom. When Crawford was finished, Morrison raped her for a third time, again holding her down and again without a condom.

When Morrison had finished with Brzonkala, he warned her "You better not have any fucking diseases." In the months following the rape, Morrison announced publicly in the dormitory's dining room that he "like[d] to get girls drunk and fuck the shit out of them."

Following the assault Brzonkala's behavior changed radically. She became depressed and avoided contact with her classmates and residents of her dormitory. She changed her appearance and cut off her long hair. She ceased attending classes and eventually attempted suicide. She sought assistance from a Virginia Tech psychiatrist, who treated her and prescribed anti-depressant medication. Neither the psychiatrist nor any other Virginia Tech employee or official made more than a cursory inquiry into the cause of Brzonkala's distress. She later sought and received a retroactive withdrawal from Virginia Tech for the 1994-95 academic year because of the trauma.

Approximately a month after Morrison and Crawford assaulted Brzonkala, she confided in her roommate that she had been raped, but could not bring herself to discuss the details. It was not until February 1995,

however, that Brzonkala was able to identify Morrison and Crawford as the two men who had raped her. Two months later, she filed a complaint against them under Virginia Tech's Sexual Assault Policy, which was published in the Virginia Tech "University Policies for Student Life 1994-1995." These policies had been formally released for dissemination to students on July 1, 1994, but had not been widely distributed to students. After Brzonkala filed her complaint under the Sexual Assault Policy she learned that another male student athlete was overheard advising Crawford that he should have "killed the bitch."

Brzonkala did not pursue criminal charges against Morrison or Crawford, believing that criminal prosecution was impossible because she had not preserved any physical evidence of the rape. Virginia Tech did not report the rapes to the police, and did not urge Brzonkala to reconsider her decision not to do so. Rape of a female student by a male student is the only violent felony that Virginia Tech authorities do not automatically report to the university or town police.

Virginia Tech held a hearing in May 1995 on Brzonkala's complaint against Morrison and Crawford. At the beginning of the hearing, which was taped and lasted three hours, the presiding college official announced that the charges were being brought under the school's Abusive Conduct Policy, which included sexual assault. A number of persons, including Brzonkala, Morrison, and Crawford testified. Morrison admitted that, despite the fact that Brzonkala had twice told him "no," he had sexual intercourse with her in the dormitory on September 21. Crawford, who denied that he had sexual contact with Brzonkala (a denial corro-

borated by his suitemate, Cornell Brown), confirmed that Morrison had engaged in sexual intercourse with Brzonkala.

The Virginia Tech judicial committee found insufficient evidence to take action against Crawford, but found Morrison guilty of sexual assault. The university immediately suspended Morrison for two semesters (one school year), and informed Brzonkala of the sanction. Morrison appealed this sanction to Cathryn T. Goree, Virginia Tech's Dean of Students. Morrison claimed that the college denied him his due process rights and imposed an unduly harsh and arbitrary sanction. Dean Goree reviewed Morrison's appeal letter, the file, and tapes of the three-hour hearing. She rejected Morrison's appeal and upheld the sanction of full suspension for the Fall 1995 and Spring 1996 semesters. Dean Goree informed Brzonkala of this decision in a letter dated May 22, 1995. According to Virginia Tech's published rules, the decision of Dean Goree as the appeals officer on this matter was final.

In the first week of July 1995, however, Dean Goree and another Virginia Tech official, Donna Lisker, personally called on Brzonkala at her home in Fairfax, Virginia, a four-hour drive from Virginia Tech. These officials advised Brzonkala that Morrison had hired an attorney who had threatened to sue the school on due process grounds, and that Virginia Tech thought there might be merit to Morrison's "ex post facto" challenge that he was charged under a Sexual Assault Policy that was not yet spelled out in the Student Handbook.[2]

[2] Brzonkala's complaint alleges that the Attorney General, who represented Virginia Tech, knew, or should have known, that

Dean Goree and Ms. Lisker told Brzonkala that Virginia Tech was unwilling to defend the school's decision to suspend Morrison for a year in court, and a re-hearing under the Abusive Conduct Policy that predated the Sexual Assault Policy was required. To induce Brzonkala to participate in a second hearing, Dean Goree and Ms. Lisker assured her that they believed her story, and that the second hearing was a mere technicality to cure the school's error in bringing the first complaint under the Sexual Assault Policy.

The Virginia Tech judicial committee scheduled the second hearing for late July. This hearing turned out to be much more than a mere formality, however. The second hearing lasted seven hours, more than twice as long as the first hearing. Brzonkala was required to engage her own legal counsel at her own expense. Moreover, the university belatedly informed her that student testimony given at the first hearing would not be admissible at the second hearing and that if she wanted the second judicial committee to consider this testimony she would have to submit affidavits or produce the witnesses. Because she received insufficient notice, it was impossible for Brzonkala to obtain the necessary affidavits or live testimony from her student witnesses. In contrast, the school provided Morrison with advance notice so that he had ample time to procure the sworn affidavits or live testimony of his

Morrison's due process claim was meritless under Virginia law because of *Abrams v. Mary Washington College*, No. CH93-193, slip op. at 4 (Cir. Ct. City of Fredricksburg, April 27, 1994). The state court in *Abrams* rejected an almost identical claim that a student's due process rights were violated when he was charged and tried under a sexual assault policy that was adopted after the incident. *Id.* at 4.

student witnesses. Virginia Tech exacerbated this difficulty by refusing Brzonkala or her attorney access to the tape recordings of the first hearing, while granting Morrison and his attorney complete and early access to those tapes. Finally, Virginia Tech officials prevented Brzonkala from mentioning Crawford in her testimony because charges against him had been dismissed; as a result she had to present a truncated and unnatural version of the facts.

Nevertheless, after the second hearing, the university judicial committee found that Morrison had violated the Abusive Conduct Policy, and re-imposed the same sanction: an immediate two semester suspension. On August 4, 1995, the college again informed Brzonkala, in writing, that Morrison had been found guilty and been suspended for a year.

Morrison again appealed. He argued due process violations, the existence of new information, and the asserted harshness and arbitrariness of the sanction imposed on him as grounds for reversal of the judicial committee's decision. Senior Vice-President and Provost Peggy Meszaros overturned Morrison's sanction on appeal. She found "that there was sufficient evidence to support the decision that [Morrison] violated the University's Abusive Conduct Policy and that no due process violation occurred in the handling of [Morrison's] case." However, the Provost concluded that the sanction imposed on Morrison—immediate suspension for one school year—was "excessive when compared with other cases where there has been a finding of violation of the Abusive Conduct Policy." Provost Meszaros did not elaborate on the "other cases" to which she was referring. Instead of an immediate

one year suspension, the Provost imposed "deferred suspension until [Morrison's] graduation from Virginia Tech." In addition, Morrison was "required to attend a one-hour educational session with Rene Rios, EO/AA Compliance Officer regarding acceptable standards under University Student Policy."

Provost Meszaros informed Morrison of the decision to set aside his sanction by letter on August 21, 1995. Although Brzonkala had been informed in writing of the result at every other juncture in the disciplinary proceedings, Virginia Tech did not notify her that it had set aside Morrison's suspension or that he would be returning to campus in the Fall. Instead, on August 22, 1995, Brzonkala learned from an article in *The Washington Post* that the university had lifted Morrison's suspension and that he would return in the Fall 1995 semester. In fact, Morrison did return to Virginia Tech in the Fall of 1995—on a full athletic scholarship.

Upon learning that the university had set aside Morrison's suspension and was permitting him to return in the Fall, Brzonkala canceled her own plans to return to Virginia Tech. She feared for her safety because of previous threats and Virginia Tech's treatment of Morrison. She felt that Virginia Tech's actions signaled to Morrison, as well as the student body as a whole, that the school either did not believe her or did not view Morrison's conduct as improper. She was also humiliated by the procedural biases of the second hearing and by the decision to set aside the sanction against Morrison. Brzonkala attended no university or college during the Fall 1995 term.

On November 30, 1995, Brzonkala was shocked to learn from another newspaper article that the second Virginia Tech judicial committee did not find Morrison guilty of sexual assault, but rather of the reduced charge of "using abusive language." Despite the fact that the school had accused and convicted Morrison of sexual assault at the initial hearing, despite Morrison's testimony at that hearing that he had had sexual intercourse with Brzonkala after she twice told him "no," and despite the fact that Dean Goree and Donna Lisker had unambiguously stated that the second hearing would also address the "sexual assault" charge against Morrison, the administrators altered the charge. The university never notified either Brzonkala or her attorney about the change, leaving her to learn about it months after the fact from a newspaper article.

Brzonkala believes and so alleges that the procedural irregularities in, as well as the ultimate outcome of, the second hearing were the result of the involvement of Head Football Coach Frank Beamer, as part of a coordinated university plan to allow Morrison to play football in 1995.

On December 27, 1995, Brzonkala initially filed suit against Morrison, Crawford, and Virginia Tech; on March 1, 1996, she amended her complaint. She alleged *inter alia* that Virginia Tech, in its handling of her rape claims and failure to punish the rapists in any meaningful manner, violated Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 (1994). She also alleged that Morrison and Crawford brutally gang raped her because of gender animus in violation of Title III of the Violence Against Women Act of 1994, 42

U.S.C. § 13981 (1994) ("VAWA"). The United States intervened to defend the constitutionality of VAWA.

On May 7, 1996 the district court dismissed the Title IX claims against Virginia Tech for failure to state a claim upon which relief could be granted. *See Brzonkala v. Virginia Polytechnic & State Univ.*, 935 F. Supp. 772 (W.D. Va. 1996) ("*Brzonkala I*"). On July 26, 1996 the court dismissed Brzonkala's VAWA claims against Morrison and Crawford, holding that although she had stated a cause of action under VAWA, enactment of the statute exceeded Congressional authority and was thus unconstitutional. *See Brzonkala v. Virginia Polytechnic & State Univ.*, 935 F. Supp. 779 (W.D. Va. 1996) ("*Brzonkala II*").

II.

Title IX of the Education Amendments of 1972 provides in relevant part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . .

20 U.S.C. § 1681(a).

Virginia Tech concedes that it is an "education program . . . receiving Federal financial assistance." Hence, we need only determine whether Brzonkala has stated a claim that she was "subjected to discrimination" by Virginia Tech "on the basis of sex." 20 U.S.C. § 1681(a). The district court recognized that

Brzonkala pled a Title IX claim on the basis of two distinct legal theories: a hostile environment theory, that Virginia Tech responded inadequately to a sexually hostile environment; and a disparate treatment theory, that Virginia Tech discriminated against Brzonkala because of her sex in its disciplinary proceedings.[3] The district court rejected both, holding that her complaint failed to state a Title IX claim on which relief could be granted under either theory. *See Brzonkala I*, 935 F. Supp. at 775-78. We now consider whether Brzonkala stated a claim under either of these theories.

A.

We begin with the hostile environment claim.[4] To assess Brzonkala's Title IX hostile environment assertions we must address two issues: (1) what legal standard to apply to a hostile environment claim under Title IX and (2) whether Brzonkala's complaint satisfies that standard.

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[3] Brzonkala also pled a claim of disparate impact based upon Virginia Tech's policy of not automatically reporting allegations of rape to the police. Brzonkala does not press this theory on appeal. We deem it waived.

[4] Virginia Tech makes a truncated argument, without reference to the complaint or any authority, that Brzonkala has not pled a hostile environment claim with sufficient specificity. The district court "glean [ed] from [Brzonkala's] complaint an allegation that [Virginia Tech] had a hand in permitting a hostile school environment based on Brzonkala's gender." *Brzonkala I*, 935 F. Supp. at 778. We agree that Brzonkala has properly pled a hostile environment claim. All that Brzonkala was required to plead was "'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. . . . Following the simple guide of Rule 8(f) that 'all pleadings shall be so construed as to do substantial justice,' we have no doubt that petitioners' complaint adequately set forth a claim and gave the respondents fair notice of its basis." *Conley v. Gibson*, 355 U.S. 41, 47-48, 78 S. Ct. 99, 103, 2 L.Ed.2d 80 (1957) (footnote omitted).

1.

Title IX unquestionably prohibits federally supported educational institutions from practicing "discrimination" "on the basis of sex." 20 U.S.C. § 1681(a) (1994). Because of Title IX's "short historical parentage," *Doe v. Claiborne County, Tenn.*, 103 F.3d 495, 514 (6th Cir. 1996), we have not previously faced a hostile environment claim under Title IX. Therefore, in determining whether an educational institution's handling of a known sexually hostile environment is actionable "discrimination" under Title IX, we must look to the extensive jurisprudence developed in the Title VII context. *See Preston v. Virginia ex rel. New River Community College*, 31 F.3d 203, 207 (4th Cir. 1994) ("Title VII, and the judicial interpretations of it, provide a persuasive body of standards to which we may look in shaping the contours of a private right of action under Title IX."); *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 832 (10th Cir. 1993) ("Title VII . . . is 'the most appropriate analogue when defining Title IX's substantive standards. . . .'"); *Lipsett v. University of P.R.*, 864 F.2d 881, 896 (1st Cir. 1988) ("Because Title VII prohibits the identical conduct prohibited by Title IX, *i.e.*, sex discrimination" Title VII is "the most appropriate analogue when defining Title IX's substantive standards. . . .") (citation omitted); *see also Franklin v. Gwinnett County Public Sch.*, 503 U.S. 60, 75, 112 S. Ct. 1028, 1037-38, 117 L.Ed.2d 208 (1992) (holding Title IX provides a private cause of action for damages arising from sexual harass-

ment and relying on *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64, 106 S. Ct. 2399, 2404, 91 L.Ed.2d 49 (1986), a Title VII hostile environment case, to define "discrimination" under Title IX); H.R. Rep. No. 554 (1971) *reprinted in* 1972 U.S.C.C.A.N. 2462, 2512 (explaining that Title IX meant to provide coverage similar to Title VII for "those in education"); and the many cases adopting Title VII analysis in a Title IX hostile environment context listed *infra* at 21-22.[5] The district court properly followed this approach and applied Title VII standards to determine Virginia Tech's liability for a hostile environment under Title IX. *See Brzonkala I*, 935 F. Supp. at 776-78.

Virginia Tech argues that this was error, relying solely upon *Rowinsky* v. *Bryan Indep. Sch. Dist.*, 80 F.3d 1006 (5th Cir.), *cert. denied*, — U.S. ——, 117 S. Ct. 165, 136 L.Ed.2d 108 (1996). *Rowinsky* dealt with a hostile environment claim by two female students against a school district for its response to sexual harassment by certain male students. A divided panel of the Fifth Circuit defined the question presented as "whether the recipient of federal education funds can be found liable for sex discrimination when the perpetrator is a party other than the grant recipient or its agents." *Id.* at 1010. In answering this question, the court determined that the language and legislative history of Title IX indicated that the statute "applies only to the practices of the recipients themselves," not third parties. *Id.* at 1013. The *Rowinsky* court

[5] *But see Smith v. Metro. Sch. Dist. Perry Township*, 128 F.3d 1014 (7th Cir. 1997) (recognizing that most other courts apply Title VII principles to Title IX cases but refusing to apply Title VII's "knew or should have known" standard to a Title IX claim).

reasoned that Title VII principles were inapplicable because "[i]n an employment context, the actions of a co-worker sometimes may be imputed to an employer through a theory of respondeat superior," but a school may not be held responsible for the harassment of one student by another. *Id.* at 1011 n.11. Accordingly, the Fifth Circuit held that "[i]n the case of [Title IX] peer sexual harassment, a plaintiff must demonstrate that the school district responded to sexual harassment claims differently based on sex. Thus, a school district might violate Title IX if it treated sexual harassment of boys more seriously than sexual harassment of girls . . . ." *Id.* at 1016.

We have no trouble agreeing with the Fifth Circuit that Title IX "applies only to the practices of the recipients themselves." *Id.* at 1013. However, in this respect Title IX is no different from Title VII—the *Rowinsky* majority's failure to recognize this results in a deeply flawed analysis. In framing the question in terms of liability for the acts of third parties, *Rowinsky* misstates what a plaintiff, under either Title VII or Title IX, hopes to prove in a hostile environment claim. Under Title VII, a plaintiff cannot recover because a fellow employee sexually harassed the plaintiff, but only because an *employer* could have, but failed to, adequately remedy known harassment. As we recently noted, "an employer is liable for a sexually hostile work environment created by . . . [an] employee only if the employer knew or should have known of the illegal conduct and *failed to take prompt and adequate remedial action.*" *Andrade* v. *Mayfair Management, Inc.*, 88 F.3d 258, 261 (4th Cir. 1996) (emphasis added). Consequently, a defendant employer is held responsible under Title VII for the employer's own actions, its

inadequate and tardy response, not the actions of fellow employees.[6]

Similarly, in a Title IX hostile environment action a plaintiff is not seeking to hold the school responsible for the acts of third parties (in this case fellow students). Rather, the plaintiff is seeking to hold the school responsible for its own actions, i.e. that the school "knew or should have known of the illegal conduct and failed to take prompt and adequate remedial action." *Andrade*, 88 F.3d at 261. Brzonkala is not attempting to hold Virginia Tech responsible for the acts of Morrison and Crawford *per se*; instead she is challenging Virginia Tech's handling of the hostile environment once she notified college officials of the rapes. Therefore, the entire focus of *Rowinsky*'s analysis as to whether a school may be held responsible for the acts of third parties under Title IX misses the point. Brzonkala does not seek to make Virginia Tech liable for the acts of third parties. She seeks only to hold the school liable *for its own* discriminatory actions in failing to remedy a known hostile environment.

A defendant educational institution, like a defendant employer, is, of course, liable for its own discriminatory actions: even the *Rowinsky* majority acknowledges

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[6] After oral argument in this case, the Eleventh Circuit followed *Rowinsky*, *see Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390 (11th Cir. 1997), but the Ninth Circuit flatly rejected the *Rowinsky* rationale. *See Oona v. McCaffrey*, 122 F.3d 1207 (9th Cir. 1997). As explained above, we, like the Ninth Circuit, "have difficulty squaring *Rowinsky's* reasoning with the Supreme Court's in *Franklin*" and our own circuit precedent, *e.g.*, *Preston*, 31 F.3d at 207, and *Andrade*, 88 F.3d at 261. *See Oona*, 122 F.3d at 1210.

this. *Rowinsky*, 80 F.3d at 1012 (Title IX "prohibits discriminatory acts" by educational institutions receiving federal financial assistance). Responsibility for discriminatory acts includes liability for failure to remedy a known sexually hostile environment. Accordingly, the district court was correct in applying Title VII principles to define the contours of Brzonkala's hostile environment claim. We now turn to that application.

2.

Under Title VII "to prevail on a 'hostile work environment' sexual harassment claim, an employee must prove: (1) that he [or she] was harassed 'because of' his [or her] 'sex'; (2) that the harassment was unwelcome; (3) that the harassment was sufficiently severe or pervasive to create an abusive working environment; and (4) that some basis exists for imputing liability to the employer." *Wrightson v. Pizza Hut of America, Inc.*, 99 F.3d 138, 142 (4th Cir. 1996). Similarly, under Title IX a plaintiff asserting a hostile environment claim must show: "1) that she [or he] belongs to a protected group; 2) that she [or he] was subject to unwelcome sexual harassment; 3) that the harassment was based on sex; 4) that the harassment was sufficiently severe or pervasive so as to alter the conditions of her [or his] education and create an abusive educational environment; and 5) that some basis for institutional liability has been established." *Kinman v. Omaha Public Sch. Dist.*, 94 F.3d 463, 467-68 (8th Cir. 1996); *Seamons v. Snow*, 84 F.3d 1226, 1232 (10th Cir. 1996) (same); *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 540 (1st Cir. 1995), *cert. denied*, 516 U.S. 1159, 116 S. Ct. 1044, 134 L.Ed.2d 191 (1996) (same); *Nicole M. v. Martinez*

Unified Sch. Dist., 964 F. Supp. 1369, 1376 (N. D. Cal. 1997) (same); *see also Doe*, 103 F.3d at 515 (holding that the elements of a "hostile environment claim under Title VII equally apply under Title IX"); *Oona, R.S. v. McCaffrey*, 122 F.3d 1207, 1210 (9th Cir. 1997) (applying Title VII standards to Title IX hostile environment claim); *Murray v. New York Univ. College of Dentistry*, 57 F.3d 243, 248-51 (2d Cir. 1995) (same); *Collier v. William Penn Sch. Dist.*, 956 F. Supp. 1209, 1213-14 (E.D. Pa. 1997) (same); *Pinkney v. Robinson*, 913 F. Supp. 25, 32 (D. D. C. 1996) (same); *Bosley v. Kearney R-1 School Dist.*, 904 F. Supp. 1006, 1021-22 (W. D. Mo. 1995) (same); *Kadiki v. Virginia Commonwealth Univ.*, 892 F. Supp. 746, 749-50 (E.D. Va. 1995) (same); *Ward v. Johns Hopkins Univ.*, 861 F. Supp. 367, 374 (D. Md. 1994) (same).

Virginia Tech concedes that Brzonkala has properly alleged the first three elements—that she was a member of a protected class, that she was subject to unwelcome harassment, and that this harassment was based on her sex. Virginia Tech contends, however, that Brzonkala has not alleged that she was subjected to a sufficiently abusive environment, or established that Virginia Tech may be held liable for that environment. Accordingly, we address these two elements.

a.

A Title IX plaintiff must allege sexual harassment "sufficiently severe or pervasive so as to alter the conditions of her education and create an abusive educational environment." *Kinman*, 94 F.3d at 468. Virginia Tech argues that because Brzonkala did not

return to school she experienced no hostile environment. The district court agreed, holding that:

> [T]he hostile environment that Brzonkala alleged never occurred. Brzonkala left [Virginia Tech] due to her concern of possible future reprisal in reaction to her pressing charges. She did not allege that this future reprisal actually occurred. Second, Brzonkala did not perceive that the environment was in fact abusive, but only that it might become abusive in the future.

Brzonkala I, 935 F. Supp. at 778.

Brzonkala pled that she was violently gang raped, and rape "is 'not only pervasive harassment but also criminal conduct of the most serious nature' that is 'plainly sufficient to state a claim for 'hostile environment' sexual harassment.'" *Gary v. Long*, 59 F.3d 1391, 1397 (D.C. Cir.), *cert. denied*, 516 U.S. 1011, 116 S. Ct. 569, 133 L.Ed.2d 493 (1995) (quoting *Meritor*, 477 U.S. at 67, 106 S. Ct. at 2405-06); *Brock v. United States*, 64 F.3d 1421, 1423 (9th Cir. 1995) ("Just as every murder is also a battery, every rape committed in the employment setting is also discrimination based on the employee's sex."); *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 430 (7th Cir. 1995) (citing *Meritor* and recognizing sexual assault as an extreme example of sexual harassment); Karen Mellencamp Davis, Note, *Reading, Writing, and Sexual Harassment: Finding a Constitutional Remedy When Schools Fail to Address Peer Abuse*, 69 Ind. L.J. 1123, 1124 (1994) ("Rape and molestation provide drastic examples of the types of sexual harassment students inflict on their peers.").

Moreover, "even a single incident of sexual assault sufficiently alters the conditions of the victim's employment and clearly creates an abusive work environment for purposes of Title VII liability." *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1305 (2d Cir. 1995) (citing *Meritor*, 477 U.S. at 67, 106 S. Ct. at 2405-06); *see also King v. Board of Regents*, 898 F.2d 533, 537 (7th Cir. 1990) (acknowledging that "a single act [of discrimination] can be enough" to state a hostile environment claim under Title VII).

Thus, the district court failed to recognize that the rapes themselves created a hostile environment, and that Virginia Tech was aware of this environment and never properly remedied it. Indeed, the university Provost's rationale for overturning Morrison's immediate suspension for one school year—that this punishment was "excessive when compared with other cases"—itself evidences an environment hostile to complaints of sexual harassment and a refusal to effectively remedy this hostile environment. Given the seriousness of the harassment acts, the total inadequacy of Virginia Tech's redress, and Brzonkala's reasonable fear of unchecked retaliation including possible violence, Brzonkala did not have to return to the campus the next year and personally experience a continued hostile environment. Brzonkala "should not be punished for a hostile environment so severe that she was forced out entirely by loss of her legal claim against those responsible for the situation." *Patricia H. v. Berkeley Unified Sch. Dist.*, 830 F. Supp. 1288, 1298 (N.D. Cal. 1993); *see also Carrero v. New York City Housing Auth.*, 890 F.2d 569, 578 (2d Cir. 1989) ("A female employee need not subject herself to an extended period of demeaning and degrading provocation

before being entitled to seek the remedies provided under Title VII.").

b.

The remaining issue is whether "some basis for institutional liability has been established." *Seamons*, 84 F.3d at 1232. "[A]n employer is liable for a sexually hostile work environment created by . . . [an] employee only if the employer knew or should have known of the illegal conduct and failed to take prompt and adequate remedial action." *Andrade*, 88 F.3d at 261. We must determine whether Brzonkala has alleged facts sufficient to support an inference that Virginia Tech "knew or should have known of the illegal conduct and failed to take prompt and adequate remedial action." Virginia Tech certainly knew about the rapes once Brzonkala informed the school and initiated disciplinary proceedings against Morrison and Crawford. The question, therefore, is whether Virginia Tech took prompt and adequate remedial action once it was on notice of the rapes. *See Paroline v. Unisys Corp.*, 879 F.2d 100, 106 (4th Cir. 1989), *vacated in part on other grounds*, 900 F.2d 27 (4th Cir. 1990) (en banc). This inquiry is necessarily fact-based, and whether a response is "prompt and adequate" will depend on the specific allegations (and ultimately evidence) in each case. *Id.* at 106-07.

Brzonkala alleges that after she was brutally raped three times she ceased attending classes, attempted suicide, and sought the aid of the school psychiatrist. Despite Virginia Tech's awareness of these developments no university official, including the psychiatrist, ever made more than a cursory inquiry into the cause of

her distress. Furthermore, she alleges that when she directly reported the rapes to Virginia Tech authorities, the college neither provided a fair hearing nor meted out appropriate punishment. During the first hearing her attacker essentially admitted that he raped her after she twice told him no. The first hearing resulted in a finding that Morrison had committed sexual assault, and his suspension for one school year. This result was upheld by an appeals officer, and under Virginia Tech's published rules that decision was final and not subject to change.

Nevertheless, Virginia Tech voided the first hearing and reopened the case against her admitted rapist, assertedly in violation of its own rules and on the basis of a specious legal argument. The second hearing was procedurally biased against Brzonkala in numerous ways, and unbeknownst to her, Morrison was only charged with the lesser offense of using abusive language. Still, Morrison was again found guilty, and suspended for the next school year. On appeal a senior college official determined that there was sufficient evidence that Morrison had violated the University's Abusive Conduct Policy, and that Morrison's due process argument was meritless. Nonetheless, the appeals officer decided that suspending Brzonkala's rapist for a school year was "excessive when compared with other cases." The university then overturned that suspension and permitted her attacker to return to school with a full athletic scholarship.

Virginia Tech took this action without notifying Brzonkala, although she had been informed of the university's actions in the case at every previous juncture. This decision caused her to fear for her safety

and to withdraw from college altogether. As punishment for his admitted rape Morrison received a "deferred suspension until [his] graduation from Virginia Tech" and "a one-hour educational session."

In short, Brzonkala alleges that Virginia Tech permitted, indeed fostered, an environment in which male student athletes could gang rape a female student without any significant punishment to the male attackers, nor any real assistance to the female victim. She alleges a legion of procedural irregularities in the hearing process, Virginia Tech's disregard for its own rules of finality, and its eventual decision to impose virtually no penalty for an admitted rape. These facts, if proven, would allow a jury to find that Virginia Tech's response to Brzonkala's gang rape was neither prompt nor adequate.

Virginia Tech argues that because it did levy some punishment against Morrison, its response was adequate. A defendant need not "make the most effective response possible" to sexual harassment. *See Spicer v. Virginia Dept. of Corrections*, 66 F.3d 705, 710 (4th Cir. 1995) (en banc). This does not mean, however, that any remedy, no matter how delayed or weak, will be adequate. Rather, we have consistently held under Title VII that a defendant employer is "liable for sexual harassment committed by its employees if no adequate remedial action is taken." *Id.* Similar reasoning applies in the Title IX context. In light of the seriousness of Brzonkala's allegations, the long and winding disciplinary process, and the proverbial slap on the wrist as punishment, we cannot conclude at this preliminary stage that Virginia Tech's remedy was either prompt or adequate.

For all of these reasons, Brzonkala has alleged sufficient facts to state a Title IX hostile environment claim against Virginia Tech.

B.

Brzonkala also alleges a Title IX disparate treatment claim, *i.e.*, that Virginia Tech discriminated against her on the basis of sex during the disciplinary proceedings against Morrison and Crawford. In analyzing Brzonkala's claim, Title VII again "provide[s] a persuasive body of standards to which we may look in shaping the contours of a private right of action under Title IX." *Preston*, 31 F.3d at 207.

Indeed, Virginia Tech does not even argue that Title VII principles are inapplicable in analyzing Title IX disparate treatment claims.

Proof of discriminatory intent is necessary to state a disparate treatment claim under Title VII. *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15, 97 S. Ct. 1843, 1854 n.15, 52 L.Ed.2d 396 (1977). Absent some indication in the statute or regulations, Title IX similarly requires proof of discriminatory intent to state a disparate treatment claim. As such, we must examine Brzonkala's complaint to see if she has alleged sufficient facts to infer such intent. *See Yusuf v. Vassar College*, 35 F.3d 709, 715 (2d Cir. 1994).

In *Yusuf*, the Second Circuit dealt with allegations of a discriminatory school disciplinary hearing, and described the type of evidence a plaintiff must plead to establish the requisite intent:

> [A]llegations of a procedurally or otherwise flawed [school disciplinary] proceeding that has led to an adverse and erroneous outcome combined with a conclusory allegation of gender discrimination is not sufficient to survive a motion to dismiss. The fatal gap is, again, the lack of a particularized allegation relating to a causal connection between the flawed outcome and gender bias. A plaintiff must thus also allege particular circumstances suggesting that gender bias was a motivating factor behind the erroneous finding. Allegations of a causal connection in the case of university disciplinary cases can be of the kind that are found in the familiar setting of Title VII cases. . . . Such allegations might include, *inter alia*, statements by members of the disciplinary tribunal, statements by pertinent university officials, or patterns of decision-making that also tend to show the influence of gender. Of course, some allegations, such as statements reflecting bias by members of the tribunal, may suffice both to cast doubt on the accuracy of the disciplinary adjudication and to relate the error to gender bias.

Yusuf, 35 F.3d at 715 (citations omitted). In this case Brzonkala has alleged a flawed proceeding and made a conclusory assertion that Virginia Tech discriminated in favor of male football players. But she has not alleged any discriminatory statements or treatment by Virginia Tech, or any systematic mistreatment of women or rape victims.

Nevertheless, Brzonkala maintains that she has made sufficient allegations of Virginia Tech's discriminatory intent. First, she argues that Virginia Tech's policy of

not automatically reporting rapes to the police shows a discriminatory intent. Brzonkala does not allege, however, that the university discouraged or hindered her (or other rape victims) from filing charges, or that the university generally treats rape less seriously in its own disciplinary proceedings. Nor does she state facts to support an inference that the university created its non-reporting policy to discriminate against rape victims. Without an allegation that Virginia Tech itself fails to punish rapists, or impedes criminal investigations, or separate facts to establish that the policy was a result of gender bias, the university has not discriminated against rape victims, because these victims can always pursue criminal charges themselves. In fact, because of the intensely personal nature of the crime, as well as the present day difficulties inherent in pursuing rape charges, a victim of rape may not always want to press charges or involve the police. *See Brzonkala I*, 935 F. Supp. at 777.

Next, Brzonkala relies upon allegations that her access to evidence, like that of the plaintiff in *Yusuf*, was hampered, as the factual basis for a finding of discriminatory intent. It is true that in *Yusuf* the plaintiff alleged numerous procedural difficulties. *Yusuf*, 35 F.3d at 712-13. But, in *Yusuf* the plaintiff also asserted that "males accused of sexual harassment at Vassar are 'historically and systematically' and 'invariably found guilty, regardless of the evidence, or lack thereof.'" *Id.* at 716. This sort of systematic discrimination, on top of the procedural irregularities, sufficed to state a claim of disparate treatment. Here we have nothing but "allegations of a procedurally or otherwise flawed proceeding that has led to an adverse and erroneous outcome combined with a conclusory

allegation of gender discrimination." *Id.* at 715. These allegations are "not sufficient to survive a motion to dismiss." *Id.*; cf. *Houck v. Virginia Polytechnic Inst. & State Univ.*, 10 F.3d 204, 206-07 (4th Cir. 1993) ("[I]n the Title VII context, isolated incidents or random comparisons demonstrating disparities in treatment may be insufficient to draw a *prima facie* inference of discrimination without additional evidence that the alleged phenomenon of inequality also exists with respect to the entire relevant group of employees."); *Cook v. CSX Transp. Corp.*, 988 F.2d 507, 511-13 (4th Cir. 1993) (same).

Finally, Brzonkala contends that the woefully inadequate punishment meted out against Morrison is in and of itself proof of sex discrimination. Again, without more, this does not prove intentional gender discrimination against Brzonkala. In sum, the district court correctly dismissed Brzonkala's Title IX claim of disparate treatment.[7]

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[7] Virginia Tech also argues that Brzonkala lacks standing to pursue injunctive relief in her Title IX claim because she has left school and does not plan to return. The record before us does not support Virginia Tech's claim that Brzonkala will never again attend Virginia Tech. All that the complaint alleges is that Brzonkala did not return to Virginia Tech in the Fall of 1995. Without a factual basis for believing that Brzonkala will not re-register at Virginia Tech, we will not dismiss for mootness her claims for injunctive relief.

III.

We now turn to the question of whether the district court erred in dismissing Brzonkala's claim that Morrison and Crawford violated Title III of the Violence Against Women Act of 1994 ("VAWA"). *See* 42 U.S.C. § 13981 (1994). The district court held that Brzonkala alleged a valid VAWA claim, but that VAWA was beyond congressional authority, and thus unconstitutional. *See Brzonkala II*, 935 F. Supp. at 801. We agree with the district court that Brzonkala stated a claim under VAWA. We conclude, however, that Congress acted within its authority in enacting VAWA and hold that the district court erred in ruling the statute unconstitutional.

A.

In September 1994, after four years of hearings, Congress enacted VAWA, a comprehensive federal statute designed to address "the escalating problem of violent crime against women." S. Rep. No. 103-138, at 37 (1993). Title III, the portion of the statute at issue in this case, establishes the right upon which a civil claim can be brought:

> All persons within the United States shall have the right to be free from crimes of violence motivated by gender. . . .

42 U.S.C. § 13981(b).

The statute goes on to set forth the elements necessary to plead and prove such a claim:

> (c) Cause of action
>
> A person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) of this section shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.
>
> (d) Definitions
>
> For purposes of this section–
>
> (1) the term "crime of violence motivated by gender" means a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender; and
>
> (2) the term "crime of violence" means–
>
> (A) an act or series of acts that would constitute a felony against the person or that would constitute a felony against property if the conduct presents a serious risk of physical injury to another, and that would come within the meaning of State or Federal offenses described in Section 16 of Title 18, whether or not those acts have actually resulted in criminal charges, prosecution, or conviction and whether or not those acts were committed in the

special maritime, territorial, or prison jurisdiction of the United States; and

(B) includes an act or series of acts that would constitute a felony described in subparagraph (A) but for the relationship between the person who takes such action and the individual against whom such action is taken.

42 U.S.C. § 13981. Thus, to state a claim under § 13981(c) a plaintiff victim must allege "a crime of violence motivated by gender." 42 U.S.C. § 13981(c).

Morrison and Crawford do not argue that Brzonkala's allegation of gang rape fails to satisfy § 13981(d)(2)'s definition of a "crime of violence." However, they do briefly assert that Brzonkala has failed to allege a "crime of violence *motivated by gender*." 42 U.S.C. § 13981(c) (emphasis added).

A "crime of violence motivated by gender" is defined as "a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender." 42 U.S.C. § 13981(d)(1). Congress has indicated that "[p]roof of 'gender motivation' under Title III" of VAWA is to "proceed in the same ways proof of race or sex discrimination proceeds under other civil rights laws. Judges and juries will determine 'motivation' from the 'totality of the circumstances' surrounding the event." S. Rep. No. 103-138, at 52; *see also* S. Rep. No. 102-197, at 50 (1991).

The statute does not outlaw "[r]andom acts of violence unrelated to gender." 42 U.S.C. § 13981(e)(1).

However, bias "can be proven by circumstantial as well as indirect evidence." S. Rep. No. 103-138, at 52. "Generally accepted guidelines for identifying hate crimes may also be useful" in determining whether a crime is gender-motivated, such as: "language used by the perpetrator; the severity of the attack (including mutilation); the lack of provocation; previous history of similar incidents; absence of any other apparent motive (battery without robbery, for example); common sense." *Id.* at 52 n.61.

With these standards in mind, we examine Brzonkala's complaint. Brzonkala alleges that two virtual strangers, Morrison and Crawford, brutally raped her three times within minutes after first meeting her. Although Brzonkala does not allege mutilation or other severe injury, the brutal and unprotected gang rape itself constitutes an attack of significant "severity." *Id.* Moreover, Brzonkala alleges that the rapes were completely without "provocation." *Id.* One of her assailants conceded during the college disciplinary hearing that Brzonkala twice told him, "No" before he initially raped her. Further, there is an absence of any "apparent motive" for the rapes other than gender bias. *Id.* For example, no robbery or other theft accompanied the rapes.

Finally, Brzonkala alleges that when Morrison had finished raping her for the second time he told her, "You better not have any fucking diseases." She also alleges that Morrison later announced to the college dining room, "I like to get girls drunk and fuck the shit out of them." Verbal expression of bias by an attacker is certainly not mandatory to prove gender bias, *Brzonkala II*, 935 F. Supp. at 785 ("The purpose of the

statute would be eviscerated if, to state a claim, a plaintiff had to allege, for example, that the defendant raped her and stated, 'I hate women.' "), but it is "helpful." *See* S. Rep. No. 103-138, at 51. As the district court noted, Morrison's "statement reflects that he has a history of taking pleasure from having intercourse with women without their sober consent" and that "[t]his statement indicates disrespect for women in general and connects this gender disrespect to sexual intercourse." *Brzonkala II*, 935 F. Supp. at 785. In addition, since Brzonkala alleged that Morrison and Crawford engaged in a conspiracy to rape her, Morrison's comments are also relevant in assessing Crawford's liability. *See Loughman v. Consol-Pennsylvania Coal Co.*, 6 F.3d 88, 103 (3d Cir. 1993) (concluding that in a civil conspiracy "every conspirator is jointly and severally liable for all acts of co-conspirators taken in furtherance of the conspiracy"); *United States v. Carpenter*, 961 F.2d 824, 828 n. 3 (9th Cir. 1992) (holding that "acts and statements in furtherance of the conspiracy may be attributed to" a co-conspirator and citing *Pinkerton v. United States*, 328 U.S. 640, 646-47, 66 S. Ct. 1180, 1183-84, 90 L.Ed. 1489 (1946)); *United States v. Chorman*, 910 F.2d 102, 111 (4th Cir. 1990) (same).

In sum, Brzonkala has clearly alleged violations of VAWA. Virtually all of the earmarks of "hate crimes" are asserted here: an unprovoked, severe attack, triggered by no other motive, and accompanied by language clearly stating bias. The district court correctly concluded that Brzonkala alleged a VAWA claim.

B.

The remaining issue before us is whether the district court correctly held that Congress exceeded its constitutional authority in enacting VAWA. Congress itself directly addressed this question. On the basis of numerous specific findings and a mountain of evidence, Congress stated that it was invoking its authority "[p]ursuant to . . . section 8 of Article I of the Constitution" to enact a new civil rights law to protect "victims of gender motivated violence and to promote public safety, health, and activities affecting interstate commerce. . . ." 42 U.S.C. § 13981(a) (emphasis added).[8] Article I, Section 8, Clause 3 of the Constitution empowers Congress to "regulate Commerce . . . among the several states." U.S. Const. art. I, § 8, cl. 3.

In assessing whether Congress exceeded its authority under the Commerce Clause, we note that every act of Congress is entitled to a "strong presumption of validity and constitutionality," *Barwick v. Celotex Corp.*, 736 F.2d 946, 955 (4th Cir. 1984), and will be invalidated only "for the most compelling constitutional reasons." *Mistretta v. United States*, 488 U.S. 361, 384, 109 S. Ct. 647, 661, 102 L.Ed.2d 714 (1989). The Supreme Court has directed that "[g]iven the deference due 'the duly enacted and carefully considered decision of a coequal and representative branch of our Govern-

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[8] Congress also expressly stated that Section 5 of the Fourteenth Amendment authorized enactment of VAWA. *See* 42 U.S.C. § 13981(a). In view of our holding that VAWA is a valid exercise of Congress' power under the Commerce Clause, we need not reach the question of whether the Fourteenth Amendment also provided authorization for VAWA.

ment,'" a court is "not lightly [to] second-guess such legislative judgments." *Westside Comm. Bd. of Educ. v. Mergens*, 496 U.S. 226, 251, 110 S. Ct. 2356, 2372, 110 L.Ed.2d 191 (1990) (quoting *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 319, 105 S. Ct. 3180, 3188, 87 L.Ed.2d 220 (1985)). This is "particularly" true when, as here, the legislative "judgments are based in part on empirical determinations." *Id.* Deference to such judgments by the legislature constitutes the "paradigm of judicial restraint." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 314, 113 S. Ct. 2096, 2101, 124 L.Ed.2d 211 (1993).

Moreover, "[t]he task of a court that is asked to determine whether a particular exercise of congressional power is valid under the Commerce Clause is relatively narrow." *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276, 101 S. Ct. 2352, 2360 (1981); *see also United States v. Lopez*, 514 U.S. 549, 568, 115 S. Ct. 1624, 1634, 131 L.Ed.2d 626 (1995) (Kennedy, J., concurring) ("The history of the judicial struggle to interpret the Commerce Clause . . . counsels great restraint before the Court determines that the Clause is insufficient to support an exercise of the national power."). Thus, a reviewing court need only determine "whether a rational basis existed for concluding that a regulated activity" substantially affects interstate commerce. *Lopez*, 514 U.S. at 557, 115 S. Ct. at 1628-29.

With these directives in mind, we consider whether Congress exceeded its authority under the Commerce Clause in passing VAWA. The Supreme Court has long held, and recently reiterated in *Lopez*, that there are

"three broad categories of activity that Congress may regulate" under the Commerce Clause:

> First, Congress may regulate the use of the channels of interstate commerce. . . . Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. . . . Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce . . . *i.e.*, those activities that substantially affect interstate commerce.

Lopez, 514 U.S. at 558-559, 115 S. Ct. at 1629-30 (citations omitted); *United States v. Bailey*, 112 F.3d 758, 765-66 (4th Cir. 1997), *cert. denied*, — U.S. ——, 118 S. Ct. 240, 139 L.Ed.2d 170 (1997) (rejecting a *Lopez* challenge to Title II of VAWA and stating *Lopez*'s three-part test).

Here, as in *Lopez*, "[t]he first two categories of authority may be quickly disposed of:" VAWA "is not a regulation of the use of the channels of interstate commerce, nor is it an attempt to prohibit the interstate transportation of a commodity through the channels of commerce; nor can [VAWA] be justified as a regulation [protecting] an instrumentality of interstate commerce or a thing in interstate commerce." *Lopez*, 514 U.S. at 559, 115 S. Ct. at 1630. "Thus, if [VAWA] is to be sustained, it must be under the third category as a regulation of an activity that substantially affects interstate commerce." *Id.*

The *Lopez* Court applied the substantial effects test to the Gun Free School Zones Act, which made it a federal crime to knowingly possess a firearm in a school zone. 18 U.S.C. § 922(q) (1988 ed. Supp. V) (amended 1994, 1996). In passing § 922(q), Congress attempted to supplant state criminal laws with a federal statute that criminalized an activity that on its face had "nothing to do with" commerce, without making *any* findings demonstrating the activity affected interstate commerce or including a jurisdictional element ensuring a case by case connection with interstate commerce. *Lopez*, 514 U.S. at 561 and n. 3, 115 S. Ct. at 1630-31 and n. 3. In these circumstances, the Supreme Court "would have [had] to pile inference upon inference" to find a rational basis for concluding the statute "substantially affect[ed] any sort of interstate commerce." *Id.* at 567, 115 S. Ct. at 1634. This the Court declined to do, and so declared § 922(q) unconstitutional. *Id.*

In contrast to the congressional silence in *Lopez*, Congress made voluminous findings when it enacted VAWA. Accordingly, we can begin where the *Lopez* Court could not, by "evaluat[ing] the legislative judgment that the activity in question substantially affected interstate commerce." *Lopez*, 514 U.S. at 563, 115 S. Ct. at 1632; *see also City of Boerne v. Flores*, — U.S. ——, —— - ——, 117 S. Ct. 2157, 2169-2170, 138 L.Ed.2d 624 (1997) (recognizing the importance of Congressional findings in determining the "appropriateness of [Congress's] remedial measures"). In doing so, we recognize that discerning a rational basis "is ultimately a judicial rather than a legislative question," *Lopez*, 514 U.S. at 557 n.2, 115 S. Ct. at 1629 n.2 (quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 273, 85 S. Ct. 348, 366, 13 L.Ed.2d 258 (1964) (Black, J., concurring)),

and "[s]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." *Id.* (quoting *Hodel*, 452 U.S. at 311, 101 S. Ct. at 2391 (Rehnquist, J., concurring)). But a "court must defer" to congressional findings when there is "a rational basis for such a finding." *Hodel*, 452 U.S. at 276, 101 S. Ct. at 2360. Indeed, "[t]he Supreme Court has without fail given effect to such congressional findings." Laurence H. Tribe, *American Constitutional Law*, 310-11 (2d ed. 1988). Accordingly, we first examine the congressional findings made in connection with VAWA. *See United States v. Leshuk*, 65 F.3d 1105, 1111-12 (4th Cir. 1995) (rejecting a *Lopez* challenge to the "Comprehensive Drug Abuse Prevention and Control Act" and beginning and ending our analysis by relying totally upon Congress's "detailed findings" on the interstate commerce effects).

1.

The Congressional findings and testimony that support the passage of VAWA pursuant to the Commerce Clause are detailed and extensive.[9] Congress carefully

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[9] Most of Congress's copious findings do not appear in the statute itself, but in applying rational basis review courts also consider congressional committee findings. *See Lopez*, 514 U.S. at 562, 115 S. Ct. at 1631; *Preseault v. ICC*, 494 U.S. 1, 17, 110 S. Ct. 914, 924-25, 108 L.Ed.2d 1 (1990) (citing House Report in discussion of congressional findings regarding effect on interstate commerce of federal "rails-to-trails" statute); *Hodel*, 452 U.S. at 277-80, 101 S. Ct. at 2360-62 (relying on committee reports to uphold Congress's power to enact the Surface Mining Act); *Hoffman v. Hunt*, 126 F.3d 575, 586 (4th Cir. 1997) (relying upon a House Report to uphold FACE).

documented the enormity of the problem caused by violence against women. For example, Congress found that:

> * "Violence is the leading cause of injury to women ages 15-44. . . ." S. Rep. No. 103-138, at 38 (1993).
>
> * "[F]or the past 4 years [prior to 1993], the U.S. Surgeons General have warned that family violence—not heart attacks or cancer or strokes—poses the single largest threat of injury to adult women in this country." *Id.* at 41- 42 (footnote omitted).
>
> * "An estimated 4 million American women are battered each year by their husbands or partners. Approximately 95% of all domestic violence victims are women." H.R.Rep. No. 103-395, at 26 (1993) (footnotes omitted).
>
> * "Three out of four American women will be victims of violent crimes sometime during their life." *Id.* at 25 (footnote omitted).
>
> * "Since 1988, the rate of incidence of rape has risen four and a half times as fast as the total crime rate. There were 109,062 reported rapes in the United States in 1992—one every five minutes. The actual number of rapes committed is approximately double that figure. . . ." *Id.* (footnotes omitted).

The committee reports similarly found that "the cost to society" resulting from violence against women "is staggering." S. Rep. No. 101-545, at 33 (1990). Domestic violence *alone* is estimated to cost employers "at least $3 billion—not million, but billion—dollars a year" due to absenteeism in the workplace. *Id.* Furthermore, "estimates suggest that we spend $5 to $10 billion a year on health care, criminal justice, and other social costs of domestic violence." S. Rep. No. 103-138, at 41. Moreover, "[i]t is not a simple matter of adding up the medical costs, or law enforcement costs, but of adding up all of those expenses plus the costs of lost careers, decreased productivity, foregone educational opportunities, and long-term health problems." S. Rep. No. 101-545, at 33.

These monetary figures were accompanied by other evidence establishing that violence against women has a substantial impact on interstate commerce:

> Over 1 million women in the United States seek medical assistance each year for injuries sustained by their husbands or other partners. As many as 20 percent of hospital emergency room cases are related to wife battering.
>
> But the costs do not end there: woman abuse "has a devastating social and economic effect on the family and the community." . . . It takes its toll in homelessness: one study reports that as many as 50 percent of homeless women and children are fleeing domestic violence. It takes its toll in employee absenteeism and sick time for women who either cannot leave their homes or are afraid to show the physical effects of the violence.

S. Rep. No. 101-545, at 37. Fear of violence "takes a substantial toll on the lives of all women, in lost work,

social, and even leisure opportunities." S. Rep. No. 102-197, at 38 (1991).

Thus, based upon an exhaustive and meticulous investigation of the problem, Congress found that:

> crimes of violence motivated by gender have a substantial adverse effect on interstate commerce, by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved, in interstate commerce . . . by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products.

H.R. Conf. Rep. No. 103-711, at 385 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1839, 1853.[10]

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[10] House Conference Report 103-711, containing the express finding that "crimes of violence motivated by gender have a substantial adverse effect on interstate commerce," was drafted by the House and Senate Conference Committees on VAWA, and was passed along with VAWA by the House on August 21, 1994 and by the Senate on August 24, 1994. *See Violence Against Women* § 5:42 (David Frazee et al. eds., 1997). Indeed, the findings in Report 103-711 were part of the original text of VAWA and were removed to the conference report only to avoid cluttering the U.S.Code with "'congressional findings' that had no force of law." *Id.* § 5:40. VAWA, of course, was enacted before *Lopez*, when the necessity of expressly finding that regulated activity had a "substantial effect" upon commerce (rather than just an "effect") was not altogether clear. Thus, it is particularly telling that in passing VAWA Congress found that gender-based violence against women does "substantially affect" interstate commerce.

In concluding that "[t]here is no doubt that Congress has the power to create the Title III remedy under" the Commerce Clause, Congress noted that:

> [g]ender-based crimes and the fear of gender-based crimes restricts movement, reduces employment opportunities, increases health expenditures, and reduces consumer spending, all of which affect interstate commerce and the national economy. Gender-based violence bars its most likely targets—women—from full participation in the national economy. For example, studies report that almost 50 percent of rape victims lose their jobs or are forced to quit in the aftermath of the crime. Even the fear of gender-based violence affects the economy because it deters women from taking jobs in certain areas or at certain hours that pose a significant risk of such violence. . . . For example, women often refuse higher paying night jobs in service/retail industries because of the fear of attack. Those fears are justified: the No. 1 reason why women die on the job is homicide and the highest concentration of those women is in service/retail industries . . . . 42 percent of deaths on the job of women are homicides; only 12 percent of the deaths of men on the job are homicides.

S. Rep. No. 103-138, at 54 & n.70 (footnotes omitted).

Our task is simply to discern whether Congress had "a rational basis" for concluding that the regulated activity—here violence against women—substantially "affected interstate commerce." *Lopez*, 514 U.S. at 558-

559, 115 S. Ct. at 1629-30.[11] After four years of hearings and consideration of voluminous testimonial, statistical, and documentary evidence, Congress made an unequivocal and persuasive finding that violence against women substantially affects interstate commerce. Even the district court recognized that "[a] reasonable inference from the congressional findings is that violence against women has a major effect on the national economy." *Brzonkala II*, 935 F. Supp. at 792. Accordingly, whatever one's doubts as to whether Title III of VAWA represents a good policy decision, *Seaton v. Seaton*, 971 F. Supp. 1188 (E.D. Tenn. 1997), we can only conclude that Congress' findings are grounded in a rational basis. We note that every court to consider the question except the court below, has so held. *See Crisonino v. New York City Housing Auth.*, No. 96 Civ. 9742(HB) (S.D.N.Y. Nov. 18, 1997); *Anisimov v. Lake*,

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[11] We and the ten other circuits to consider the matter have all applied the rational basis test to post-*Lopez* Commerce Clause challenges. *See Hoffman*, 126 F.3d 575, 583-88 (stating and applying rational basis test); *United States v. Knutson*, 113 F.3d 27, 29 (5th Cir. 1997) (same); *United States v. Parker*, 108 F.3d 28, 30 (3rd Cir. 1997), *cert. denied*, — U.S. ——, 118 S. Ct. 111, 139 L.Ed.2d 64 (1997) (same); *United States v. Olin Corp.*, 107 F.3d 1506, 1509 (11th Cir. 1997) (same); *United States v. Bramble*, 103 F.3d 1475, 1482 (9th Cir. 1996) (same); *Terry v. Reno*, 101 F.3d 1412, 1416 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1264, 117 S. Ct. 2431, 138 L.Ed.2d 193 (1997) (same); *Proyect v. United States*, 101 F.3d 11, 12 (2d Cir. 1996) (same); *United States v. McHenry*, 97 F.3d 125, 128 (6th Cir. 1996), *cert. denied*, 519 U.S. 1131, 117 S. Ct. 992, 136 L.Ed.2d 873 (1997) (same); *United States v. Hampshire*, 95 F.3d 999, 1001 (10th Cir. 1996), *cert. denied*, — U.S. ——, 117 S. Ct. 753, 136 L.Ed.2d 690 (1997) (same); *United States v. Kenney*, 91 F.3d 884, 889 (7th Cir. 1996) (same); *United States v. Dinwiddie*, 76 F.3d 913, 920 (8th Cir. 1996), *cert. denied*, — U.S. ——, 117 S. Ct. 613, 136 L.Ed.2d 538 (1996) (same).

982 F. Supp. 531 (N.D. Ill. 1997); *Seaton*, 971 F. Supp. at 1194; *Doe v. Hartz*, 970 F. Supp. 1375 (N.D. Iowa 1997); *Doe v. Doe*, 929 F. Supp. 608 (D. Conn. 1996).

In fact, in *United States v. Leshuk*, 65 F.3d 1105 (4th Cir. 1995), we recently relied exclusively on less extensive Congressional findings to uphold Section 401(a)(1) of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 841(a)(1) (1994). *Id.* at 1111, 1112. In *Leshuk* the defendant was convicted of possessing and cultivating marijuana in violation of § 841(a)(1), and raised a *Lopez* challenge to the statute. Id. at 1107-08. We held that *Lopez* did not require the invalidation of § 841(a)(1) because the "intrastate drug activities" that it regulated "are clearly tied to interstate commerce." 65 F.3d at 1112. We based our conclusion wholly on Congress's "detailed findings that intrastate manufacture, distribution, and possession of controlled substances, as a class of activities, have a substantial and direct effect upon interstate drug trafficking and that effective control of the interstate problems requires the regulation of both intrastate and interstate activities." *Id.* (internal quotation marks omitted). Without further ado we "relied upon these findings" to hold the Commerce Clause authorized Congress to enact this statute. *Id.*

Similarly, earlier this year, in *Hoffman v. Hunt* we reviewed "the congressional reports" to uphold the Freedom of Access to Clinics Act (FACE), determining that those reports made "clear" that "several aspects of interstate commerce are directly and substantially affected by the regulated conduct." 126 F.3d 575, 586-88 (4th Cir. 1997). Because Congress had made these persuasive findings we concluded that we did not need

to "'pile inference upon inference' to find a substantial effect on interstate commerce." *Id.* (quoting *Lopez*, 514 U.S. at 567, 115 S. Ct. at 1633-34). The congressional findings setting forth VAWA's substantial effect on interstate commerce are far more detailed and complete than those we found sufficient to establish a rational basis for the statutes challenged in *Leshuk* and *Hoffman*, and we thus have no hesitation similarly upholding VAWA. When a court finds "that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, [its] investigation is at an end." *United States v. Beuckelaere*, 91 F.3d 781, 785 (6th Cir. 1996) (quoting *Katzenbach v. McClung*, 379 U.S. 294, 303, 85 S. Ct. 377, 383, 13 L.Ed.2d 290 (1964)).[12]

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[12] Indeed, post-*Lopez*, numerous courts have reiterated that such deference to congressional findings is required; "court[s] must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding." *Terry*, 101 F.3d at 1416; *Proyect*, 101 F.3d at 12-13 (same); *United States v. McKinney*, 98 F.3d 974, 979 (7th Cir. 1996) (same), *cert. denied*, 520 U.S. 1110, 117 S. Ct. 1119, 137 L.Ed.2d 319 (1997); *Hampshire*, 95 F.3d at 1004 (same); *United States v. Kim*, 94 F.3d 1247, 1250 (9th Cir. 1996) (same); *United States v. Bishop*, 66 F.3d 569, 577 (3d Cir. 1995), *cert. denied*, 516 U.S. 1066, 116 S. Ct. 750, 133 L.Ed.2d 698 (1996) (same); *Cheffer v. Reno*, 55 F.3d 1517, 1520-21 (11th Cir. 1995) (same); *see also Knutson*, 113 F.3d at 29-31 (upholding 18 U.S.C. § 922(o) solely on the basis of "congressional findings" and noting that *Lopez* "made clear that federal Commerce Clause legislation continues to merit a high degree of judicial deference"); *United States v. Monteleone*, 77 F.3d 1086, 1091-92 (8th Cir. 1996) (upholding 18 U.S.C. § 922(d) on the basis of "explicit Congressional findings").

2.

Contrary to the district court's holding, and the arguments of Morrison and Crawford, nothing in *Lopez* requires a different result.

In noting that § 922(q) "plow[ed] thoroughly new ground and represent[ed] a sharp break with the longstanding pattern of federal firearms legislation," *Lopez*, 514 U.S. at 563, 115 S. Ct. at 1632, the *Lopez* Court clearly indicated that in finding this statute unconstitutional it was enunciating a "limited holding." *Id.* at 568, 115 S. Ct. at 1634 (Kennedy, J., concurring). Although the Court refused to make an "additional expansion" to Congress's Commerce power to uphold § 922(q), and clarified that a regulated activity must "substantially affect interstate commerce," it did not overrule a single Commerce Clause precedent, signal a decrease in congressional power under the Commerce Clause, or abandon the "rational basis" test. *Id.* at 557-69, 115 S. Ct. at 1629-34; *see also United States v. Wright*, 117 F.3d 1265, 1269 (11th Cir. 1997) ("*Lopez* did not alter our approach to determining whether a particular statute falls within the scope of Congress's Commerce Clause authority."); *United States v. Wilson*, 73 F.3d 675, 685 (7th Cir. 1995) (The *Lopez* Court "reaffirmed rather than overturned the previous half century of Commerce Clause precedent"), *cert. denied*, 519 U.S. 806, 117 S. Ct. 46-47, 136 L.Ed.2d 12 (1996).

In fact, in describing the history of the Court's Commerce Clause jurisprudence, *Lopez* forthrightly affirmed the modern expansive view of Congress's power under the Commerce Clause, and eschewed the more restrictive view of "commerce" based on formalistic

distinctions between "direct" and "indirect" effects on interstate commerce. *Id.* at 555, 115 S. Ct. at 1627- 28. The Court noted that "modern-era precedents . . . confirm that this power is subject to outer limits," *i.e.* it cannot "be extended so as to embrace effects upon interstate commerce so indirect and remote" as to "obliterate the distinction between what is national and what is local and create a completely centralized government." *Id.* at 555-59, 115 S. Ct. at 1628-29. But the Court expressly followed decades of "modern-era precedents" recognizing that a court's only role in considering a Commerce Clause challenge is "to decide whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce." *Id.* at 557, 115 S. Ct. at 1629 (citing *Hodel*, 452 U.S. at 276-80, 101 S. Ct. at 2360-62; *Perez v. United States*, 402 U.S. 146, 155-56, 91 S. Ct. 1357, 1362, 28 L.Ed.2d 686 (1971)); *Katzenbach v. McClung*, 379 U.S. 294, 299-301, 85 S. Ct. 377, 381-82, 13 L.Ed.2d 290 (1964); and *Heart of Atlanta Motel*, 379 U.S. at 252-253, 85 S. Ct. at 354-55; see *also Lopez*, 514 U.S. at 574, 115 S. Ct. at 1637 (Kennedy, J., concurring) (*Lopez* does not "call in question" prior commerce clause "principles").[13]

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[13] Thus, it is unsurprising that "courts have resisted urgings to extend *Lopez* beyond § 922(q)." *United States v. Wall*, 92 F.3d 1444, 1448 (6th Cir. 1996), *cert. denied*, — U.S. ——, 117 S. Ct. 690, 136 L.Ed.2d 613 (1997) (upholding 18 U.S.C. § 1955, which prohibits *inter alia* intrastate illegal gambling activities). Indeed, post-*Lopez* innumerable federal statutes have been challenged on Commerce Clause grounds but not a single one has been invalidated by a federal appellate court. *See, e.g., Hoffman*, 126 F.3d 575, 582-88 (upholding 18 U.S.C. § 248, which prohibits interference with access to reproductive health clinics); *United States v. Soderna*, 82 F.3d 1370, 1373-74 (7th Cir.), *cert. denied*, — U.S. ——, 117 S. Ct. 507, 136 L.Ed.2d 398 (1996) (same); *Dinwiddie*, 76 F.3d at 919-21 (same); *Terry*, 101 F.3d at 1415-18 (same); *Wilson*, 73 F.3d at 679-88 (same); *Cheffer*, 55 F.3d at 1519-21 (same); *Wright*, 117 F.3d at 1268-1271 (upholding 18 U.S.C. § 922(o), which prohibits intrastate possession of machine gun, and noting that every circuit to consider the question had so held); *United States v. Crump*, 120 F.3d 462, 465-66 (4th Cir. 1997) (upholding 18 U.S.C.A. § 924(c)(1), which prohibits use and carrying of a firearm during and in relation to a drug trafficking crime, and noting "all of the circuits that have considered the question" had upheld the statute in the face of a *Lopez* challenge); *Olin Corp.*, 107 F.3d at 1509-10 (upholding CERCLA, 42 U.S.C. §§ 9601-9675); *United States v. Allen*, 106 F.3d 695, 700-1 (6th Cir. 1997), *cert. denied*, (1997) (upholding 21 U.S.C. § 860(a), the Drug Free School-Zones Act); *United States v. Hawkins*, 104 F.3d 437, 439-40 (D.C. Cir. 1997), *cert. denied*, — U.S. ——, 118 S. Ct. 126, 139 L.Ed.2d 76 (1997) (same); *United States v. Wells*, 98 F.3d 808, 810-11 (4th Cir. 1996) (upholding 18 U.S.C. § 922(g), which prohibits possession of a firearm by a felon, and noting ten other circuits that had upheld its constitutionality under *Lopez*); *United States v. Genao*, 79 F.3d 1333, 1335-37 (2d Cir. 1996) (same); *United States v. Tisor*, 96 F.3d 370, 373-75 (9th Cir. 1996), *cert. denied*, 519 U.S. 1140, 117 S. Ct. 1012, 136 L.Ed.2d 889 (1997) (upholding congressional authority to prohibit intrastate possession or sale of narcotics); *Leshuk*, 65 F.3d at 1111-12 (same); *Bramble*, 103 F.3d at 1479-82 (upholding the Eagle Protection Act, 16 U.S.C. § 668); *United States v. Michael R.*, 90 F.3d 340, 343-45 (9th Cir. 1996) (upholding 18 U.S.C. § 922(x)(2), which prohibits juvenile possession of a handgun); *United States v. Lomayaoma*, 86 F.3d 142, 144- 46 (9th Cir.), *cert. denied*, — U.S. ——, 117 S. Ct. 272, 136 L.Ed.2d 196 (1996) (upholding the Indian Major Crimes Act, 18 U.S.C. § 1153).

Morrison and Crawford's reliance on *Lopez* falters not only because they ignore the limited nature of the *Lopez* holding but also because VAWA differs from § 922(q) in several important respects. In order to uphold VAWA, we need not "pile inference upon inference" as the Government asked the Court to do in *Lopez*. *Lopez*, 514 U.S. at 567, 115 S. Ct. at 1633-34. Because Congress made no findings to support § 922(q) the Government was forced to argue that guns in

schools affected commerce based upon several tenuous, multi-layered theories. *See id.* at 564, 115 S. Ct. at 1632; *Terry*, 101 F.3d at 1418 (quoting *Lopez*, 514 U.S. at 564, 115 S. Ct. at 1632) (For example, "gun possession near schools threatens the educational environment, which hampers the educational process, which creates a 'less productive citizenry' which adversely affects 'the Nation's economic well-being' and which in the end adversely affects interstate commerce."). VAWA, by contrast, regulates behavior—gender-based violent crime against women—which Congress has found substantially and gravely affects interstate commerce on the basis of abundant evidence. *Cf. Perez*, 402 U.S. at 154, 91 S. Ct. at 1362 (rejecting Commerce Clause challenge because "credit transactions, though purely intrastate, may in the judgment of Congress affect interstate commerce"). To connect VAWA with interstate commerce, a court need not make any inferences—Congress itself has clearly established and documented that gender based violence against women substantially affects interstate commerce.

Additionally, unlike § 922(q), VAWA does not invade areas of traditional state control. The *Lopez* Court noted that "[u]nder our federal system, the 'States possess primary authority for defining and enforcing the criminal law.' . . . When Congress criminalizes conduct already denounced as criminal by the States, it effects a 'change in the sensitive relation between federal and state criminal jurisdiction.'" *Lopez*, 514 U.S. at 561, 115 S. Ct. at 1631 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 635, 113 S. Ct. 1710, 1720-21, 123 L.Ed.2d 353 (1993), and *United States v. Enmons*, 410 U.S. 396, 411-12, 93 S. Ct. 1007, 1015-16, 35 L.Ed.2d 379 (1973)). Title III of VAWA is not a criminal statute and

it displaces no state criminal law. *Cf. id.* (noting that statute in *Lopez* "displace[s] state policy choices" and "overrides legitimate state . . . laws"). Nothing in Title III prevents a victim of gender-based violence from bringing state criminal charges or pursuing state tort remedies, or affects how the state treats those claims.

In fact, far from displacing state law, Congress carefully designed VAWA to harmonize with state law and protect areas of state concern. Thus, VAWA references state criminal laws in defining a "crime of violence." *See* 42 U.S.C. § 13981(d)(2) (defining "crime of violence" as "an act or series of acts that would constitute a felony against the person or that would constitute a felony against property if the conduct presents a serious risk of physical injury to another, and that would come within the meaning of *State* or Federal offenses described in section 16 of Title 18. . . .") (emphasis added). Moreover, Congress expressly limited the reach of VAWA in further deference to traditional areas of state expertise such as divorce or child custody proceedings. *See* 42 U.S.C. § 13981(e) (4) (VAWA does not confer "jurisdiction over any State law claim seeking the establishment of a divorce, alimony, equitable distribution of marital property, or child custody decree."). In sum, VAWA acts to supplement, rather than supplant, state criminal, civil, and family law controlling gender violence. The States are still free to "experiment[ ] to devise various solutions" to the problems of gender-based violence against

women. *Lopez*, 514 U.S. at 581, 115 S. Ct. at 1641 (Kennedy, J., concurring). [14]

In addition, unlike the statute invalidated in *Lopez*, VAWA does not occupy a legal territory where "States lay claim by right of history and expertise." *Id.* at 581-83, 115 S. Ct. at 1641 (Kennedy, J., concurring). Instead, VAWA legislates in an area—civil rights—that has been a federal responsibility since shortly after the Civil War. Furthermore, federal action is particularly appropriate when, as here, there is persuasive evidence that the States have not successfully protected the rights of a class of citizens. In passing VAWA Congress made extensive and convincing findings that state law had failed to successfully address gender-motivated violence against women. Congress concluded that:

> Other State remedies have proven inadequate to protect women against violent crimes motivated by gender animus. Women often face barriers of law, of practice, and of prejudice not suffered by other victims of discrimination. Traditional State law sources of protection have proved to be difficult avenues of redress for some of the most serious crimes against women. Study after study has concluded that crimes disproportionately affecting

[14] In fact, State Attorneys General from forty-one states supported the passage of VAWA. They told Congress: "Our experience as attorneys general strengthens our belief that the problem of violence against women is a national one, requiring federal attention, federal leadership, and federal funds." *See Crimes of Violence Motivated by Gender: Hearing Before the Subcomm. on Civil and Constitutional Rights of the Senate Comm. on the Judiciary*, 103d Cong. 34-36 (1993) (Letter from State Attorneys General).

> women are often treated less seriously than crimes affecting men. [C]ollectively, these reports provide overwhelming evidence that gender bias permeates the court system and that women are most often its victims.

S. Rep. No. 103-138, at 49 (footnotes omitted).[15] In VAWA, Congress has passed a civil rights law, a quintessential area of federal expertise, in response to "existing bias and discrimination in the criminal justice system." H.R. Conf. Rep. No. 103-711, at 385 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1839, 1853.

[15] The studies referred to in the above quotation were largely State-sponsored, including the following: Administrative Office of the California Courts Judicial Counsel, *Achieving Equal Justice for Women and Men in the Courts* (1990); Colorado Supreme Court Task Force on Gender Bias in the Courts, *Gender & Justice in the Colorado Courts* (1990); *Connecticut Task Force on Gender Justice and the Courts* (1991); Florida Supreme Court Gender Bias Study Commission, *Report* (1990); Supreme Court of Georgia, *Gender and Justice in the Courts* (1991); Illinois Task Force, *Gender Bias in the Courts* (1990); Maryland Special Joint Committee, *Gender Bias in the Courts* (1989); Massachusetts Supreme Judicial Court, *Gender Bias Study of the Court System in Massachusetts* (1989); Michigan Supreme Court Task Force on Gender Issues in the Courts, *Final Report* (1989); Minnesota Supreme Court Task Force for Gender Fairness in the Courts, *Final Report* (1989); Nevada Supreme Court Gender Bias Task Force, *Justice For Women* (1989); New Jersey Supreme Court Task Force, *Women in the Courts* (1984); New York Task Force on Women in the Courts, *Report* (1986); *Rhode Island Supreme Court Committee on Women in the Courts* (1987); Utah Task Force on Gender and Justice, *Report to the Utah Judicial Council* (1990); Vermont Supreme Court and Vermont Bar Association, *Gender and Justice: Report of the Vermont Task Force on Gender Bias in the Legal System* (1991); Washington State Task Force, *Gender and Justice in the Courts* (1989); Wisconsin Equal Justice Task Force, *Final Report* (1991). *See* S. Rep. No. 103-138, at 49 n.52.

Nonetheless, Morrison and Crawford argue that *Lopez* requires a different result. They note that § 922(q) had "nothing to do with 'commerce'" and was not "an essential part of a larger regulation of economic activity," *Lopez*, 514 U.S. at 561, 115 S. Ct. at 1631, and assert that VAWA similarly regulates a non-economic activity and is therefore beyond Congress's Commerce Clause authority. This argument, however, misreads both *Lopez* and VAWA.

First, as Morrison and Crawford concede, *Lopez* clearly does not hold that a statute must regulate economic activity to pass muster under the Commerce Clause. Such a holding could not be squared with past Commerce Clause jurisprudence, or *Lopez* itself. *Lopez* quoted *Wickard v. Filburn*'s famous statement that "[e]ven if appellee's activity be local and *though it may not be regarded as commerce*, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce." *Wickard v. Filburn*, 317 U.S. 111, 125, 63 S. Ct. 82, 89, 87 L.Ed. 122 (1942) (emphasis added), *quoted in Lopez*, 514 U.S. at 556, 115 S. Ct. at 1628. Similarly, the *Lopez* Court relied on *Heart of Atlanta Motel*, 379 U.S. 241, 85 S. Ct. 348, 13 L.Ed.2d 258 and *Katzenbach*, 379 U.S. at 294, 85 S. Ct. at 379. *See Lopez*, 514 U.S. at 557-563, 115 S. Ct. at 1628-32. These cases involved the public accommodation provisions of the Civil Rights Act of 1964, 78 Stat. 243 (codified as amended at 42 U.S.C. § 2000a (1994)), not an "economic" regulation but a civil rights statute, which like VAWA prohibits acts motivated by

bias that have a substantial effect on interstate commerce.[16]

Furthermore, the actual basis of the *Lopez* holding, which Morrison and Crawford attempt to ignore, undermines their argument as to the importance of "economic activity." The *Lopez* Court did not strike down § 922(q) because it regulated non-economic activity. The Court invalidated § 922(q) because neither Congress nor the Government convinced the Court that there was a rational basis for concluding that possession of a gun in a school zone substantially affected interstate commerce. *Lopez*, 514 U.S. at 561-67, 115 S. Ct. at 1631-33. Here, however, there clearly is a rational basis for

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[16] Thus, we follow our sister circuits and hold that *Lopez* does not narrow Congress's Commerce Clause authority solely "to the regulation of commercial actors, and not private individuals who interfere with commercial activities in interstate commerce. To the contrary, the Court . . . [has upheld] statutes which penalize behavior substantially affecting interstate commerce without regard to the actor's commercial or private status." *Cheffer*, 55 F.3d at 1520 n. 6; *see also Knutson*, 113 F.3d at 30 (same); *United States v. Hicks*, 106 F.3d 187, 189 (7th Cir. 1997), *cert. denied*, 520 U.S. 1258, 117 S. Ct. 2425, 138 L.Ed.2d 188 (1997) (same); *Dinwiddie*, 76 F.3d at 920-21 (same); *Terry*, 101 F.3d at 1417 (same); *Wilson*, 73 F.3d at 684-85 (same). As Chief Judge Posner recently noted, the fact that a law was not explicitly meant "to increase the gross national product by removing a barrier to free trade, but rather to protect personal safety and property rights, is irrelevant [because] . . . Congress can regulate interstate commerce for any lawful motive." *Soderna*, 82 F.3d at 1374 (citing *Heart of Atlanta Motel*, 379 U.S. at 256-57, 85 S. Ct. at 356-58). The Supreme Court itself has recognized, "[a]n enterprise surely can have a detrimental influence on interstate or foreign commerce without having its own profit-seeking motives." *National Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 258, 114 S. Ct. 798, 804, 127 L.Ed.2d 99 (1994).

concluding that gender-based violence against women does precisely this.

Even if the regulated activity itself had to have an economic nexus, VAWA, unlike § 922(q), regulates an activity that is "an essential part of a larger regulation of economic activity." *Lopez*, 514 U.S. at 561-63, 115 S. Ct. at 1631. As recounted above, Congress recognized the enormous impact that violence against women has on women in the workplace, and as such, VAWA, along with Title VII, can be seen as a part of a larger regulatory effort to eliminate gender-based violence as a barrier to job opportunities. Congress found that "current law provides a civil rights remedy for gender crimes committed in the workplace, but not for crimes of violence motivated by gender committed on the street or in the home." H.R. Conf. Rep. No. 103-711, at 385 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1839, 1853. VAWA was meant to fill that gap.

Morrison and Crawford's reliance on the fact that VAWA, like § 922(q), does not have a jurisdictional restriction is unpersuasive for similar reasons. *Lopez* does not require that a statute contain a jurisdictional limit in order to pass Commerce Clause scrutiny. *See Olin Corp.*, 107 F.3d at 1510; *United States v. Rybar*, 103 F.3d 273, 285 (3rd Cir. 1996), *cert. denied*, — U.S. ——, 118 S. Ct. 46, 139 L.Ed.2d 13 (1997); *Terry*, 101 F.3d at 1418; *Wall*, 92 F.3d at 1449 n. 11; *Wilson*, 73 F.3d at 685. "If a jurisdictional element were critical to a statute's constitutionality, the Court in *Lopez* would not have gone on to examine the Government's proffered rationales for the constitutionality of the gun possession statute." *Terry*, 101 F.3d at 1418.

The core teaching of *Lopez* is simply that Congress must ensure that legislation enacted pursuant to its Commerce Clause authority reaches only activities that "substantially affect interstate commerce." A jurisdictional element or Congressional findings assist a court in determining whether a regulated activity substantially affects interstate commerce. But neither is necessary for constitutional validity. *See Wright*, 117 F.3d at 1269 (Congress need not "place a jurisdictional element" in a statute or make "legislative findings connecting the regulated activity to interstate commerce."). Although Congressional findings are not required, here we do have abundant legislative findings evidencing that Congress did indeed ensure that the regulated activity substantially affected interstate commerce. As noted above, we recently relied on far less detailed Congressional findings to uphold a statute that did not regulate economic activities and had no jurisdictional element. *Leshuk*, 65 F.3d at 1111-12.

Finally, our holding that Congress had a rational basis to conclude that violence against women has a substantial effect on interstate commerce does not mean, as Morrison and Crawford contend, that acting pursuant to the Commerce Clause Congress can reach any activity, including divorces, child-support, and "diet and exercise habits." This argument ignores the years of hearings on the need for VAWA and the reams of congressional findings made in support of VAWA. It belittles the seriousness of the national problem that discriminatory violence against women presents. It overlooks VAWA's explicit deference to State expertise: the statute's express restriction to gender-motivated violent crimes is defined in part in reference to state law, and it prohibits jurisdiction over divorce,

alimony, and child custody matters. *See* 42 U.S.C. § 13981(e)(4).

Most importantly, this argument disregards the ineludible fact that our role is simply to determine if Congress had a rational basis for concluding that a regulated activity "substantially affect[s] interstate commerce." *Lopez*, 514 U.S. at 560, 115 S. Ct. at 1630. After four years of hearings and extensive legislative findings, Congress has adjudged that violence against women substantially affects interstate commerce. It is "abundantly clear that our job in this case is not to second-guess the legislative judgment of Congress that" violence against women "substantially affects interstate commerce, but rather to ensure that Congress had a rational basis for that conclusion." *Bishop*, 66 F.3d at 577. In light of Congress' findings, well supported by testimony and data, we hold that Congress had such a rational basis in enacting VAWA.

We note that it is apparent that Congress took great care to detail its findings and support its conclusion that VAWA was within its commerce authority. The breadth of the record itself manifests that Congress understood its duty to act only within its enumerated powers in this case, and took that duty seriously. As the Supreme Court explained in *Polish Nat'l Alliance v. NLRB*, 322 U.S. 643, 650, 64 S. Ct. 1196, 1200, 88 L.Ed. 1509 (1944):

> [Whether] the conduct of an enterprise affects commerce among the States is a matter of practical judgment, not to be determined by abstract notions. The exercise of this practical judgment the Constitution entrusts primarily and very largely to the Congress, subject to the latter's control by the electorate. Great power was thus given to the Congress: the power of legislation and thereby the power of passing judgment upon the needs of a complex society. Strictly confined though far-reaching power was given to this Court: that of determining whether the Congress has exceeded limits allowable in reason for the judgment which it has exercised.

See also Lopez, 514 U.S. at 578, 115 S. Ct. at 1639 (Kennedy, J., concurring) (It is Congress' and the President's "obligation to preserve and protect the Constitution in maintaining the federal balance . . . in the first and primary instance."). In following our "[s]trictly confined" duty in this case, we must conclude that Congress has in no way "exceeded limits allowable in reason for the judgment which it has exercised." *Polish Nat'l Alliance*, 322 U.S. at 650, 64 S. Ct. at 1200. Congress acted within its Commerce Clause authority in enacting VAWA.[17]

IV.

To summarize, we hold that Brzonkala's complaint states a claim under Title IX against Virginia Tech, and under the Violence Against Women Act against Morrison and Crawford. Further, we hold that the Com-

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[17] Once a court has decided that a Congressional act is within the commerce power the only remaining question is whether "the means chosen by" Congress are "reasonably adapted to the end permitted by the Constitution." *Hodel*, 452 U.S. at 276, 101 S. Ct. at 2360 (quoting *Heart of Atlanta Motel*, 379 U.S. at 262, 85 S. Ct. at 360). No party contests this point, and we hold that VAWA's civil remedy is well within appropriate congressional means.

merce Clause provides Congress with authority to enact the Violence Against Women Act. Accordingly, the judgments of the district court dismissing both the Title IX and Violence Against Women Act claims are reversed and the case is remanded for further proceedings.

No. 96-1814—*REVERSED AND REMANDED.*

No. 96-2316—*REVERSED AND REMANDED.*

LUTTIG, Circuit Judge, dissenting:

Fully aware of the importance of the matter before us today, I would unhesitatingly affirm the judgment below on the essential reasoning set forth by the district court. *Brzonkala v. Virginia Polytechnic & State University*, 935 F.Supp. 779 (W.D. Va. 1996). Judge Kiser's lengthy opinion is an excellent legal analysis of the constitutionality of the Violence Against Women Act under Article I, § 8, cl.3 of the Constitution. That analysis is thorough, scholarly, and, most important, abidingly faithful to the Supreme Court's decision in *United States v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624, 131 L.Ed.2d 626 (1995). The district court's analysis describes in detail the Supreme Court's new analytical framework for addressing Commerce Clause challenges, and meticulously and dispassionately applies the principles and reasoning from *Lopez* in addressing the challenge to the legislation at issue in this case. *Compare Hoffman v. Hunt*, 126 F.3d 575, 1997 WL 578787 (4th Cir. 1997) (same).

The district court's careful opinion brings into sharp relief not only the analytical superficiality of the majority's opinion, but also the majority's manifest misreading of the Supreme Court's historically significant *Lopez* decision and, therefore, its fundamental misunderstanding of the import of that decision and its implications for the Violence Against Women Act.

Among the more profound of its errors, the majority, in complete disregard of Lopez, does not include even a single sentence—not one—of the "independent evaluation" of the effect on interstate commerce of the Violence Against Women Act required under that decision. See Lopez, 514 U.S. at 562, 115 S. Ct. at 1631. Ignoring entirely the overarching change in Commerce Clause analysis wrought by *Lopez*, the majority merely recites several statements from House and Senate committees on the general problem of violence against women and the effect of that violence on the national economy, together with a sentence from a House Report stating that violence against women substantially affects interstate commerce (incidentally, never mentioning that the Senate, as opposed to the House, did not conclude that such violence substantially affects interstate commerce) and then simply states, without more, that the Act is constitutional.

The majority thus reaches its conclusion that the Violence Against Women Act is a constitutional exercise of the Commerce Clause power through application of a principle of absolute judicial deference to a committee finding—precisely what the Supreme Court held in *Lopez* was no longer appropriate in the review of Commerce Clause challenges to federally enacted statutes, even for findings by the full Congress. *See, e.g., Lopez*, 514 U.S. at 557 n. 2, 115 S. Ct. at 1629 n. 2 ("[S]imply because Congress may conclude that a particular activity substantially affects interstate

commerce does not necessarily make it so. [W]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court." (citations and internal quotation marks omitted)).

The majority's elevation of a committee's finding not merely to preeminence among the constitutionally relevant considerations, but to a position as dispositive of the constitutional inquiry, is not at all inadvertent; to the contrary, it is quite intentional. In fact, trumpeting a misplaced reliance on *United States v. Leshuk*, 65 F.3d 1105 (4th Cir. 1995), the majority is at pains throughout its opinion to emphasize that it rests its conclusion entirely on the "finding" in the House Report, which it ascribes to the Congress as a whole and then accepts wholly and uncritically:

> After four years of hearings and consideration of voluminous testimonial, statistical, and documentary evidence, Congress made an unequivocal and persuasive finding that violence against women substantially affects interstate commerce. . . . *Accordingly*, whatever one's doubts as to whether VAWA represents a good policy decision, we can only conclude that Congress' findings are grounded in a rational basis.

Ante at 968 (emphasis added; citation omitted); *see also id.* at 966 (describing *Leshuk* as "rejecting a *Lopez* challenge to the 'Comprehensive Drug Abuse Prevention and Control Act' *and beginning and ending our analysis by relying totally upon Congress's 'detailed findings' on the interstate commerce effects*" (emphasis

added)); *id.* at 968 (again comparing majority's conclusion with that in *Leshuk* and characterizing *Leshuk* as a case where, "*[w]ithout further ado* we 'relied upon the[ ] [congressional] findings' to hold the Commerce Clause authorized Congress to enact this statute" (quoting *Leshuk*, 65 F.3d at 1112; emphasis added)); *id.* at 973 ("Although Congressional findings are not required, here we do have abundant legislative findings evidencing that Congress did indeed ensure that the regulated activity substantially affected interstate commerce. As noted above, we relied *exclusively* on far less detailed Congressional findings to uphold a statute that did not regulate economic activity and had no jurisdictional element." (Emphasis added; citation to *Leshuk* omitted)).

The majority's wholesale deference to a committee finding would at least be understandable if that committee had made extensive findings deserving of deference. However, the majority ultimately sustains the constitutionality of the Act literally on the basis of a single sentence appearing in that committee report, which sentence is, itself, entirely conclusory.

After properly concluding that it cannot rely upon Congress' Section 5 findings in support of its Commerce Clause analysis,[1] and after recognizing that the bulk of

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[1] For its unexplained conclusion that violence against women has a substantial effect on interstate commerce and therefore is a valid exercise of Congress' Commerce Clause power, the majority properly does not rely on the findings Congress made to justify VAWA under Section 5 of the Fourteenth Amendment. Thus, the majority distinguishes between the findings made in support of Congress' exercise of its Section 5 power and the findings made in

its recited findings bear only on "the enormity of the problem" of domestic violence against women, not on that problem's effect on interstate commerce, *see ante* at 966-68, the majority is left with but a single conclusory sentence in the Report of one House to which to defer in sustaining VAWA under Article I. *See ante* at 967 ("crimes of violence motivated by gender have a substantial adverse effect on interstate commerce. . . .").[2] This lone conclusory sentence constitutes the

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support of Congress' exercise of its Commerce Clause power, as does the Department of Justice. *Compare* Br. of Intervenor-Appellant United States at 4, 6-8 (detailing congressional findings on the "Impact on the National Economy and Interstate Commerce"), *with id.* at 9-16 (detailing congressional findings on the "Bias in State Judicial Systems"); *compare also id.* at 965-970 (arguing in reliance upon findings recited at 4-8 that VAWA is a valid exercise of Congress' power under the Commerce Clause), *with id.* at 961-965 (arguing in reliance upon findings recited at 9-16 that VAWA is a valid exercise of Congress' power under Section 5). It may be, as the Department of Justice contends, that congressional findings that the civil rights of women are being violated bear on the question of whether a statute impermissibly encroaches on traditional state functions. *See* Br. for Intervenor-Appellant United States at 32 ("An exercise of Commerce Clause power cannot plausibly be invalidated *on the basis of federalism concerns* where the declared purpose of the statute, supported by extensive legislative evidence, is to secure the civil rights the states have failed to protect." (emphasis added)). But, as the Department and the majority both recognize, it would be untenable to hold that such findings even bear on, much less largely resolve, the threshold question of whether violence against women has an effect on interstate commerce at all.

[2] The majority cites to only one other sentence from the four years of congressional debate in support of its holding, and that sentence from a Senate committee report does not even purport to find that gender-motivated violence *substantially* affects interstate commerce (although the majority seems to presume that it does). *See id.* at 967 ("Gender-based crimes and the fear of gender-

entirety of the "mountain of evidence," *ante* at 964, the "reams," *id.* at 973, the "voluminous," *id.* at 965, the "copious," *id.* at 966 n. 9, the "detailed," *id.* at 966, the "unequivocal," *id.* at 968, the "abundant," *id.* at 973, and the "persuasive," *id.* at 968, congressional findings upon which the majority upholds VAWA. This one sentence is the basis upon which the majority concludes that "it is apparent that Congress took great care to detail its findings and support its conclusions that VAWA was within its commerce authority." *Id.* at 973.

It should go without saying that this one sentence is functionally no different from a complete absence of express congressional findings. *See Lopez*, 514 U.S. at 562, 115 S. Ct. at 1631. This single conclusory sentence no better "enables [the court] to evaluate the legislative judgment that the activity in question substantially affect[s] interstate commerce," *id.* at 563, 115 S. Ct. at 1632, than would have no statement at all. Rather than the "paradigm of judicial restraint" as the majority asserts, *ante* at 965 (quoting *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 314, 113 S. Ct. 2096, 2101, 124 L.Ed.2d 211 (1993)), deference to this kind of "finding" is judicial activism merely parading as restraint.

Related to its reflexive acceptance of the committee's conclusory finding as to the effect on interstate commerce of domestic violence against women, the ma-

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based crimes restricts movement, reduces employment opportunities, increases health expenditures, and reduces consumer spending, all of which affect interstate commerce and the national economy."). The sentence speaks more to the effects of such violence on the economy in general than on interstate commerce, in any event.

jority, of necessity, includes scarcely even a reference to the majority opinion in Lopez *in reaching its conclusion that the Violence Against Women Act is constitutional.* Only after concluding that the Act is constitutional does the majority perfunctorily address the bulk of the Court's most significant pronouncements on the Commerce Clause. *See, e.g., ante* at 969 (noting, after holding Act constitutional on the basis of the Committee findings alone, that "nothing in *Lopez* requires a different result"). Thus, the majority upholds the Violence Against Women Act without so much as a mention of the economic or noneconomic character of the legislation—much less the quite different constitutional analysis required depending upon which type of statute is at issue;[3] the presence or absence of a jurisdictional element that would ensure case-by-case that the necessary effect on interstate commerce exists; or the consequences of its holding for the "first principles" of divided powers, which the Supreme Court believed so important in the constitutional equation that it began and ended its opinion with a full discussion of them, *compare* Br. for Intervenor-Appellant United States at 19 (noting that principles of federalism were of "a critical concern to

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[3] So far afield is the majority's reasoning from that of the Supreme Court in *Lopez*, that the majority all but holds that the character of legislation as "economic" or "noneconomic" is irrelevant under *Lopez*. See *ante* at 972 ("The *Lopez* Court did not strike down § 922(q) because it regulated non-economic activity. The Court invalidated § 922(q) because neither Congress nor the Government convinced the Court that there was a rational basis for concluding that possession of a gun in a school zone substantially affected interstate commerce." (citation omitted)); *id.* ("Even if the regulated activity itself had to have an economic nexus . . .").

the Court in *Lopez*"). Consistent with the majority's view of *Lopez* as a fact-specific case of little significance, these pivotal considerations are, and plainly so, consigned to afterthought.

The majority opinion is, it should come as no surprise, categorically inconsistent with our court's recent carefully written and analyzed opinion in Hoffman v. Hunt, 126 F.3d 575, 586-88, *wherein we upheld the Freedom of Access to Clinic Entrances Act of 1994 ("FACE").* Indeed, the majority must resort to mischaracterization of that opinion in order to avoid the evident inconsistency with its own opinion. The majority states, in transparent legerdemain, that the court in *Hoffman* reviewed the congressional reports "to *uphold*" the Freedom of Access to Clinics Act. *Ante* at 968; *see also id.* (stating that "similarly" to *Leshuk*, *Hoffman* relied wholly on Congress' findings). However, in *Hoffman* we did not review the congressional reports to *uphold* the Act; we merely reviewed them, together with the other factors from *Lopez*, particularly the close and direct connection of the regulated conduct with an economic activity, *in upholding* the Act. The difference is obvious. Indeed, this is precisely the significance of *Lopez*. After *Lopez*, it is clear that the courts are to undertake an independent review of the relationship between the regulated activity and interstate commerce, not simply to rubber-stamp Congress' findings as to that relationship, as the majority does.

Similarly, the majority states that "[b]ecause Congress had made these persuasive findings we concluded [in *Hoffman*] that we did not need to 'pile inference upon inference' to find a substantial effect on interstate commerce." *Ante* at 968. Again, however, we did not

reason in this way at all. We did not say that we did not need to pile inference upon inference *because Congress had made the findings*; rather, and quite differently, we said that the piling of inferences was unnecessary because *our own independent determination* had revealed that there existed a real and substantial connection between the conduct regulated under FACE and interstate commerce. Again, the difference between *Hoffman* and the majority opinion, and, more importantly, between the majority opinion and *Lopez*, is obvious.

Finally, in powerful irony, at the same time that the majority decides the Commerce Clause challenge to VAWA with barely a mention of the analysis carefully laid out by the Supreme Court in Lopez, *the majority does not include even a single sentence of discussion of the district court's exhaustive analysis that it summarily reverses—an analysis which actually is, in contrast to the majority's opinion, scrupulously faithful not only to Supreme Court precedent, but to our Circuit precedent as well.*

In short, the majority opinion reads, as intended, as if *Lopez* were never decided, holding for our Circuit, explicitly on the authority of Judge Kravitch's opinion in *United States v. Wright*, 117 F.3d 1265, 1269 (11th Cir. 1997), and implicitly on the reasoning advocated by the dissenting Justices in *Lopez*, that "'*Lopez* did not alter our approach to determining whether a particular statute falls within the scope of Congress's Commerce Clause authority.'" *Ante* at 969. Indeed, as the majority tacitly acknowledges, with understandable reluctance, it views *Lopez*, the most significant Commerce Clause decision in more than half a century, as an

case limited in its reach to section 922(q), of Title 18, of the United States Code. *See ante* at 969 n. 13 ("[I]t is unsurprising that 'courts have resisted urgings to extend *Lopez* beyond § 922(q).'" (citations omitted)).

I suspect that, even in its discretion, the Supreme Court would not allow today's decision to stand, not only because of the decision's bold intransigence in the face of the Court's recent decision, but also because the Commerce Clause challenge to the instant statute pristinely presents the Court with the logical next case in its considered revisitation of the Commerce Clause. Because today's decision wholly ignores the Supreme Court's analysis in *Lopez* and conflicts directly with our recent post-*Lopez* decision in *Hoffman v. Hunt*, however, I have every hope that our own court will obviate the need for such further review.

I respectfully dissent.

APPENDIX C

UNITED STATES DISTRICT COURT
W.D. VIRGINIA
ROANOKE DIVISION

Civil Action No. 95-1358-R

CHRISTY BRZONKALA, PLAINTIFF

v.

VIRGINIA POLYTECHNIC AND STATE UNIVERSITY,
ET AL., DEFENDANTS

July 26, 1996

MEMORANDUM OPINION

KISER, Chief Judge.

On March 1, 1996, Christy Brzonkala filed an amended complaint alleging violations of Title IX of the Education Amendment Act, 20 U.S.C. § 1681, *et seq.*, of Title III of the Violence Against Women Act, 42 U.S.C. § 13981 ("VAWA"), and of various state laws. Brzonkala brought claims against Virginia Polytechnic Institute & State University ("VPI"), William Landsidle in his capacity as Comptroller of the Commonwealth, and three VPI football players, Antonio Morrison, James Crawford, and Cornell Brown.

I dismissed the claims against VPI, William Landsidle, and Cornell Brown, and now I will consider the claims against Morrison and Crawford. Only the VAWA and some state law claims remain.

I. Alleged Facts

Brzonkala is an adult female who resides in Fairfax, Virginia. She attended VPI where she was a "student athlete" and a prospect for the women's softball team. Morrison and Crawford are adult males. They attend VPI where they are members of the all-male football team. On the night of September 21, 1994 and the morning of the next day, Brzonkala was sexually assaulted in a room on the third floor of her dormitory by two men whom she and Hope Handley, another female student, had met less than a half-hour earlier and whose identities she knew only by given names and by their status as football team members. Brzonkala alleges that the two men forced her to have sexual intercourse by threat and intimidation and through the use of Brzonkala's "mental incapacity and physical helplessness." She alleges that the two men's acts "were motivated wholly by discriminatory animus toward her gender and were not random acts of violence." Brzonkala reported that she was not inebriated at the time of the assaults. About five months later, Brzonkala learned that the assailants were Morrison and Crawford.

On September 21, Brzonkala, Handley, Morrison, and Crawford were in a room on the third floor of Brzonkala's dormitory. Handley and Crawford left the room following fifteen minutes of conversation, and Morrison immediately requested intercourse with Brzonkala.

Brzonkala audibly told Morrison "no" twice. When Brzonkala rose to leave, Morrison forced her face-up onto a bed, pushed her down by her shoulders, and disrobed her. Morrison pinned her down by her elbows with his hands, pressed his knees against her legs, and forced her to submit to vaginal intercourse. Brzonkala attempted to push Morrison off. Then, before Brzonkala could recover, Crawford came back into the room, exchanged places with Morrison, and forced Brzonkala to submit to vaginal intercourse by pinning down her arms and placing his knees against her legs. Again before Brzonkala could recover, Morrison exchanged places with Crawford and forced Brzonkala to submit to vaginal intercourse a third time. Afterwards, Morrison said to Brzonkala, "You better not have any fucking diseases." Neither Morrison nor Crawford used a condom.

In February 1995, Brzonkala recognized Morrison and Crawford as the two men who forced her to submit to intercourse. Prior to this identification, Morrison announced publicly in the dormitory's dining hall and in the presence of VPI student Charlotte Wachter, "I like to get girls drunk and fuck the shit out of them." At the end of April 1995, Brzonkala filed a complaint against Morrison and Crawford under VPI's Sexual Assault Policy. After Brzonkala filed her complaint, she learned that a VPI student overheard an unidentified male VPI athlete advise Crawford that he should have "killed the bitch."

In the first hearing, Morrison admitted the sexual contact and admitted that Brzonkala told him "no" twice. Crawford confirmed that Morrison had sexual conduct with Brzonkala and testified that Brzonkala

was "really drunk" when she arrived in the room. Crawford denied that he had sexual contact with Brzonkala. The VPI judicial committee found Morrison guilty of sexual assault and suspended him from school for two semesters. The committee found insufficient evidence to take action against Crawford. In May 1995, Morrison appealed the committee's sanction, and an appeals officer upheld the sanction.

During a second hearing, the judicial committee found Morrison guilty of abusive conduct and reimposed the sanction of an immediate two-year suspension. Morrison appealed the result, and, without notice to Brzonkala, VPI set aside the sanction against Morrison. Morrison returned to VPI for the Fall 1995 semester. Brzonkala learned through a November 30, 1995 newspaper article that the judicial committee at the second hearing had actually found Morrison guilty of a reduced charge of "using abusive language." Because Morrison would be present on the VPI campus during the Fall 1995 semester, Brzonkala feared for her personal safety and canceled her plan to return to VPI for the Fall semester.

II. Statute

42 U.S.C. § 13981. Civil Rights

(a) Purpose

Pursuant to the affirmative power of Congress to enact this part under section 5 of the Fourteenth Amendment to the Constitution, as well as under section 8 of Article I of the Constitution, it is the purpose of this part to protect the civil rights of victims of

gender motivated violence and to promote public safety, health, and activities affecting interstate commerce by establishing a Federal civil rights cause of action for victims of crimes of violence motivated by gender.

(b) Right to be free from crimes of violence

All persons within the United States shall have the right to be free from crimes of violence motivated by gender (as defined in subsection (d) of this section).

(c) Cause of action

All persons (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) of this section shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.

(d) Definitions

For purposes of this section——

(1) the term "crime of violence motivated by gender" means a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender; and

(2) the term "crime of violence" means——

(A) an act or series of acts that would constitute a felony against the person or that would constitute a felony against property if the conduct presents a serious risk of physical injury to another, and that would come within the meaning of State or Federal offenses described in section 16 of Title 18, whether or not those acts have actually resulted in criminal charges, prosecution, or conviction and whether or not those acts were committed in the special maritime, territorial, or prison jurisdiction of the United States; and

(B) includes an act or series of acts that would constitute a felony described in subparagraph (A) but for the relationship between the person who takes such action and the individual against whom such action is taken.

(e) Limitation and procedures

(1) Limitation

Nothing in this section entitles a person to a cause of action under subsection (c) of this section for random acts of violence unrelated to gender or for acts that cannot be demonstrated, by a preponderance of the evidence, to be motivated by gender (within the meaning of subsection (d) of this section).

(2) No prior criminal action

Nothing in this section requires a prior criminal complaint, prosecution, or conviction to establish the elements of a cause of action under subsection (c) of this section.

(3) Concurrent jurisdiction

The Federal and State courts shall have concurrent jurisdiction over actions brought pursuant to this part.

(4) Supplemental jurisdiction

Neither section 1367 of Title 28 nor subsection (c) of this section shall be construed, by reason of a claim arising under such subsection, to confer on the courts of the United States jurisdiction over any State law claim seeking the establishment of a divorce, alimony, equitable distribution of marital property, or child custody decree.

III. Issues

Two issues are involved: (1) whether the complaint sufficiently states a claim by Fed. R. Civ. P. 12(b)(6) standards, and, if so, (2) whether VAWA is constitutional.

IV. Whether Brzonkala States a Claim

A. Standard

Rule 12(b)(6) dismissals are generally disfavored and only granted when it appears beyond doubt that a plaintiff can prove no set of facts in support of its claim which would entitle it to relief. *Conley v. Gibson*, 355 U. S. 41, 45-46, 78 S. Ct. 99, 102, 2 L.Ed.2d 80 (1957). I may only test plaintiff's complaint for any legal deficiency and must construe the factual allegations in a light most favorable to the plaintiff. *Scheuer v. Rhodes*, 416 U. S. 232, 94 S. Ct. 1683, 40 L.Ed.2d 90 (1974); *Schatz v. Rosenberg*, 943 F.2d 485, 489 (4th Cir. 1991), *cert. denied*, 503 U. S. 936, 112 S. Ct. 1475, 117 L.Ed.2d 619 (1992).

B. Analysis

The sticking point in determining if Brzonkala sufficiently stated a VAWA claim is whether she has sufficiently alleged that the rape was "motivated by gender." A crime "motivated by gender" is defined as a crime "committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender." *See* 42 U.S.C. § 13981(d)(1).

Defendants argue that Brzonkala failed the liberal pleading standards of Fed. R. Civ. P. 8. "A pleading which sets forth a claim for relief . . . shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief, ..." Fed. R. Civ. P. 8(a). "Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required." Fed. R. Civ. P. 8(e)(1).

The legislative history behind VAWA sheds some light on the proof requirements which, in turn, shed some light on the pleading requirements. "Proof of 'gender-motivation' under [T]itle III should proceed in the same ways proof of race or sex discrimination proceeds under other civil rights laws. Judges and juries will determine 'motivation' from the 'totality of the circumstances' surrounding the event." S. Rep. No. 197, 102d Cong., 2d Sess. 50 (1991). "Bias, in short, can be proved by circumstantial as well as indirect evidence." S. Rep. No. 138, 103d Cong., 1st Sess. 52 (1993).

> Generally accepted guidelines for identifying hate crimes may also be useful in assessing whether the circumstances show gender-motivation. The following characteristics are used to determine whether a crime is bias related: language used by the perpetrator; the severity of the attack (including mutilation); the lack of provocation; previous history of similar incidents; absence of any other apparent motive (battery without robbery, for example); common sense. . . .

S. Rep. No. 197, 102d Cong., 2d Sess. 50 n. 72. The statute in question "requires subjective proof on a case-by-case basis that the criminal was motivated by a bias against the victim's gender. Whether a particular crime is, in fact, gender-motivated will be a question of fact for the court or jury to decide. . . ." S. Rep. No. 138, 103d Cong., 1st Sess. 49-50.

In support of her VAWA claim, Brzonkala makes the conclusory statement that Morrison and Crawford's actions "were motivated wholly by discriminatory animus toward her gender and were not random acts of violence." Such a conclusory statement is likely insuffi-

cient to state a claim. *Cf. Simpson v. Welch*, 900 F.2d 33 (4th Cir. 1990). However, Brzonkala has alleged other facts that support this conclusory statement.

Brzonkala alleges that she had met Morrison and Crawford less than a half-hour before she was raped, that Morrison and Crawford participated in a gang rape of Brzonkala, Morrison having sex with her one time before and one time after Crawford had sex with her, that neither Morrison nor Crawford used a condom, that, after raping her the second time, Morrison stated to Brzonkala, "You better not have any fucking diseases," and finally that, within about five months after the rapes, Morrison announced publicly in the dormitory's dining hall and in the presence of at least one woman, "I like to get girls drunk and fuck the shit out of them."

I need not decide whether the allegation of the rapes alone is sufficient to state a claim. All rapes are not the same, and the characteristics of the rapes here alleged, when compared to other rapes, indicate that gender animus more likely played a part in these rapes than in some other types of rape. First, the assault involved a gang rape. While any rape is egregious, all other factors the same, gang rape generally is more egregious than one-on-one rape. Where, as here, two men rape one woman, this indicates a conspiracy of disrespect for that woman. Second, these rapes fall somewhere in between stranger rape and date rape, and are probably closer to stranger rape. Again, while any rape is egregious, stranger rape and rapes such as the one in question generally are more egregious than date rape. Additionally, stranger rape generally more likely than date rape involves gender animus. For example, date

rape could involve a misunderstanding and is often less violent than stranger rape. By the facts alleged, the case at hand does not involve any misunderstanding. Date rape could also involve a situation where a man's sexual passion provokes the rape by decreasing the man's control. Here there is no indication that sexual passion caused Morrison to initiate intercourse. Finally, date rape could involve in part disrespect for the victim as a person, not as a woman; in date rape the perpetrator knows the victim's personality to some extent. In the case at hand, the facts indicate that Morrison and Crawford had little if any knowledge of Brzonkala's personality. Therefore, by process of elimination, an inference of gender animus is more reasonable in this situation than in some other rapes.

In Morrison's case, two facts other than the characteristics of the rapes point to gender animus. After having intercourse with Brzonkala for the second time, Morrison stated, "You better not have any fucking diseases." While the relevance of this to gender animus is questionable, this further evidences the disrespect that Morrison had for Brzonkala, irrespective of any knowledge of her personality. More importantly and more relevant to gender animus, Morrison stated at a later date, in the presence of at least one woman, "I like to get girls drunk and fuck the shit out of them." Although Morrison did not state that he likes to rape women, his statement reflects that he has a history of taking pleasure from having intercourse with women without their sober consent. This statement indicates disrespect for women in general and connects this gender disrespect to sexual intercourse, and, at least, raises an issue to be pursued in discovery. Although the statement is relevant without such an inference, the

reasonable inference that Brzonkala was intoxicated at the time of the rapes further links Morrison's statement to the alleged rapes at issue. While Brzonkala alleges that she "reported that she was not inebriated at the time of the assaults," she also alleges that Morrison raped her "through the use of [her] mental incapacity." Crawford stated that Brzonkala was "really drunk."

Congress obviously intended this statute to apply to rapes motivated by gender bias. Morrison's actions outwardly evidence gender animus more than many, if not most, situations of rape (at least before discovery has revealed any other evidence of gender animus). The purpose of the statute would be eviscerated if, to state a claim, a plaintiff had to allege, for example, that the defendant raped her and stated, "I hate women." Defendants indicate that plaintiffs must allege facts such as an ongoing series of sexual assaults by the defendant. But, as plaintiff points out, she has not had opportunity to take discovery to uncover any possible prior similar assaults. Additionally, I question whether the alleged sexual assault plus a statement indicating that Morrison enjoys having intercourse with women against their sober consent is any less indicative of gender animus than an allegation of a series of sexual assaults.

Therefore, at least against Morrison, Brzonkala has successfully stated a claim for a violation of 42 U.S.C. § 13981. The characteristics of the rape combined with Morrison's statements are sufficient at least to meet the minimal federal pleading requirements. Whether Brzonkala can prove the allegations in her complaint by a preponderance of the evidence is not currently an issue before the Court. Deciding whether a claim is

stated against Crawford is unnecessary considering my decision on the constitutionality of VAWA.

V. Whether VAWA (42 U.S.C. § 13981) Is Constitutional

If VAWA is constitutional, it must be based either on the Commerce Clause or the Enforcement Clause of the Fourteenth Amendment.

A. Commerce Clause

1. Commerce Power Generally

Article I of the U. S. Constitution authorizes Congress "[t]o regulate commerce . . . among the several States. . . ." U. S. Const., art. I, § 8, cl. 3. Plaintiff [1] argues that VAWA is constitutional because it addresses conduct that substantially affects interstate commerce. In *United States v. Lopez*, [514] U. S. [549], 115 S. Ct. 1624, 131 L.Ed.2d 626 (1995), the Supreme Court considered the constitutionality of former 18 U.S.C. § 922(q), the Gun-Free Zone Act of 1990, which forbade "'any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.'" *Id.* at ——, 115 S. Ct. at 1626 (quoting former 18 U.S.C. § 922(q)(1)(A) (1988 ed., Supp. V)). Specifically, the Court considered whether this act was a permissible use of Congress's commerce power.

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[1] From this point on, "plaintiff" may refer to Brzonkala's initial counsel, the Government, which intervened on Brzonkala's behalf, amici, or some or all of the above.

In answering this issue, the Court considered important that "the scope of the interstate commerce power 'must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.' "*Id.* at ——-——, 115 S. Ct. at 1628-1629 (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 37, 57 S. Ct. 615, 624, 81 L.Ed. 893 (1937)). The Court has "heeded that warning" and has "undertaken to decide whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce." *Id.* at ——, 115 S. Ct. at 1629 (citing among other cases *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264, 276-280, 101 S. Ct. 2352, 2360-2362, 69 L.Ed.2d 1 (1981)). The Supreme Court has not "'declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities.'" *Id.* (quoting *Maryland v. Wirtz*, 392 U. S. 183, 197 n. 27, 88 S. Ct. 2017, 2024 n. 27, 20 L.Ed.2d 1020 (1968)). "Rather, '[t]he Court has said only that where a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.'" *Id.* (quoting *Wirtz*, 392 U. S. at 197 n. 27, 88 S. Ct. at 2024 n. 27).

Under its commerce power, Congress may regulate three broad categories of activity. First, Congress may regulate the use of the channels of interstate commerce. Second, Congress may regulate and protect the instrumentalities of interstate commerce, or persons or things

in interstate commerce, even though the threat may come only from intrastate activities. Third, Congress may regulate those activities having a substantial relation to interstate commerce. *Id.* at ——- - ——, 115 S. Ct. at 1629-1630 (citations omitted). In *Lopez*, the Court concluded that, in order to qualify for the third category, the regulated activity must "substantially affect" interstate commerce. *Id.* at ——, 115 S. Ct. at 1630.

2. First Two Categories

As in *Lopez*, in the case at hand the first two categories can be easily eliminated. VAWA is not "a regulation of the use of the channels of interstate commerce, nor is it an attempt to prohibit the interstate transportation of a commodity through the channels of commerce." *Cf. Lopez*, 514 U. S. at ——, 115 S. Ct. at 1630. Also, VAWA is not a regulation by which Congress has sought to protect an instrumentality of interstate commerce or a thing in interstate commerce. *Cf. id.* Admittedly women often travel between states, as do their abusers and assailants, but certainly more is required to qualify for the commerce power. Therefore, if VAWA is a permissible exercise of power under the Commerce Clause, it must qualify for the third category: it must regulate an activity that has a substantial effect on interstate commerce.

3. *Lopez's* Analysis of Substantial Effect on Interstate Commerce

The effects-analysis of the majority decision in *Lopez* can be broken down into four parts. First, the Court noted the relevance of the nature of the regulated activity; the Court distinguished that case, dealing with the regulation of intrastate possession of guns, from cases dealing with the regulation of an intrastate activity which is economic in nature. Second, the Court considered whether § 922(q) had any jurisdictional element to ensure in individual cases that the firearm possession would affect interstate commerce. Third, the Court considered the importance of legislative history. And finally the Court considered the practical implications of accepting the Government's argument that the economic impact of the regulated activity had sufficient effects on interstate commerce to sustain the regulation.

a. Nature of Regulated Activity

In *Lopez*, the Court noted that *Wickard v. Filburn*, 317 U. S. 111, 63 S. Ct. 82, 87 L.Ed. 122 (1942), was perhaps the most far-reaching example of Commerce Clause authority over intrastate activity and that *Wickard* involved economic activity in a way that the possession of a gun in a school zone does not. *Lopez*, 514 U. S. at ——- - ——, 115 S. Ct. at 1630-1631. In *Wickard*, Roscoe Filburn operated a small farm in Ohio, on which he raised 23 acres of wheat for the year involved. He would sow winter wheat in the fall, harvest it in July, then sell some of it, feed some of it to his farm animals, and keep the remainder for seeding future crops. *Wickard*, 317 U. S. at 114, 63 S. Ct. at 84.

The Secretary of Agriculture assessed a penalty against Filburn under the Agricultural Adjustment Act of 1938, because Filburn had harvested about 12 more acres of wheat than the Act permitted. *Id.* at 114- 115, 63 S. Ct. at 84. The Court sustained the application of the Act to this activity, stating that home-grown wheat "competes with wheat in commerce," because "it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market." *Id.* at 128, 63 S. Ct. at 91.

The *Lopez* Court differentiated § 922(q) from the statute in *Wickard*, because

> [s]ection 922(q) is a criminal statute that by its terms has nothing to do with "commerce" or any sort of economic enterprise, however broadly one might define those terms. Section 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.

Lopez, 514 U. S. at —— - ——, 115 S. Ct. at 1630-1631 (footnote omitted). In effect, the Court separated the Commerce Clause analysis between situations where regulated intrastate activity is economic in nature and situations where the intrastate activity is not. After *Lopez*, cases such as *Wickard*, where regulated intrastate activity is economic in nature, do not control cases where regulated intrastate activity is not economic. At

the least, after *Lopez*, whether intrastate activity is economic in nature is a very relevant consideration.

b. Individual Case Inquiry

In the next step in *Lopez*, the Court considered important that § 922(q) did not contain a "jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce." *Id.* at ——, 115 S. Ct. at 1631. Section 922(q) had no jurisdictional element which limited "its reach to a discrete set of firearm possessions" that had "an explicit connection with or effect on interstate commerce." *Id.*

c. Relevance of Legislative History

The Court noted that the Government conceded that no express congressional findings were presented regarding the effects upon interstate commerce of gun possession in a school zone and that "to the extent that congressional findings would enable [the Court] to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here." *Id.* at —— - ——, 115 S. Ct. at 1631-1632. The Court, however, also stated that such findings were not necessary. *Id.* at ——, 115 S. Ct. at 1631 (citations omitted). The Court further noted that Congress had made findings under an amended § 922(q). *Id.* at —— n. 4, 115 S. Ct. at 1632 n. 4. At oral argument, the Government stated regarding the congressional findings, "[W]e're not relying on them in the strict sense of the word, but we think that at a very minimum they indicate that reasons can be

identified for why Congress wanted to regulate this particular activity." *Id.* From this statement, the Court surmised that "[t]he Government [did] not rely upon these subsequent findings as a substitute for the absence of findings in the first instance." *Id.*

d. Practical Implications

The Court addressed the practical implications of accepting as sufficient the Government's argued effects on commerce. *Id.* at ——- - ——, 115 S. Ct. at 1632-1634. The Government argued that

> possession of a firearm in a school zone may result in violent crime and that violent crime can be expected to affect the national economy in two ways. First, the costs of violent crime are substantial, and, through the mechanism of insurance, those costs are spread throughout the population. Second, violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe. The Government also argues that the presence of guns in schools poses a substantial threat to the educational process by threatening the learning environment. A handicapped educational process, in turn, will result in a less productive citizenry. That, in turn, would have an adverse effect on the Nation's economic well-being. As a result, the Government argues that Congress could rationally have concluded that § 922(q) substantially affects interstate commerce.

Id. at ——, 115 S. Ct. at 1632.

The Court observed that, if the regulation was constitutional based on these effects, then Congress's power

would be extended too far. Under the Government's "costs of crime" reasoning, Congress could regulate "not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce." *Id.* The Court stated that, under the Government's "national productivity" reasoning, Congress could regulate "any activity that [Congress] found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example." *Id.* The Court concluded, "Thus, if we were to accept the Government's arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate." *Id.* Under the "threat to learning" reasoning, Congress could directly regulate family law issues and education. *Id.* at ——- - ——, 115 S. Ct. at 1632-1633.

4. Application of *Lopez's* Substantial Effects Analysis to the Case at Hand

Congressional findings in support of VAWA reveal that violence against women is prevalent, and the Senate Report states that

> [g]ender-based violent crimes meet the modest threshold required by the Commerce Clause. Gender-based crimes and fear of gender-based crimes restricts movement, reduces employment opportunities, increases health expenditures, and reduces consumer spending, all of which affect interstate commerce and the national economy. Gender-based violence bars its most likely targets–women–from full participation in the national economy. For example, studies report that almost

> 50 percent of rape victims lose their jobs or are forced to quit in the aftermath of the crime. Even the fear of gender-based violence affects the economy because it deters women from taking jobs in certain areas or at certain hours that pose a significant risk of such violence.

S. Rep. 138, 103d Cong., 1st Sess. 54 (1993). Notably, the *Lopez* Court stated, "'[S]imply because Congress may conclude that a particular activity affects interstate commerce does not necessarily make it so.'" *Lopez*, 514 U. S. at —— n. 2, 115 S. Ct. at 1629 n. 2 (quoting *Hodel v. Virginia Surface Mining and Reclamation Assn., Inc.*, 452 U. S. 264, 311, 101 S. Ct. 2389, 2391, 69 L.Ed.2d 1 (1981) (Rhenquist, J., concurring)). "'Whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court.'" *Id.* (quoting *Heart of Atlanta Motel v. United States*, 379 U. S. 241, 273, 85 S. Ct. 348, 366, 13 L.Ed.2d 258 (1964)). This is particularly true where, subsequent to the Senate's above finding, the "modest threshold required by the Commerce Clause" has become less modest. The House Conference found:

> [C]rimes of violence motivated by gender have a substantial adverse effect on interstate commerce, by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved, in interstate commerce; crimes of violence motivated by gender have a substantial adverse effect on interstate commerce, by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products.

H.R.Rep. No. 711, 103d Cong., 2d Sess. 385 (1994), U. S. Code Cong. & Admin. News 1801, 1853.

The differences between *Lopez* and the case at hand are insignificant, and the similarities are significant. Arguably the following three differences between the case at hand and *Lopez* render *Lopez's* logic inapplicable to the case at hand: (1) that VAWA is civil, and the *Lopez* statute was criminal, (2) that there are legislative findings here but not in *Lopez*, and (3) that fewer steps of causation exist between the VAWA regulated activity and commerce than § 922(q)'s regulated activity and commerce. The similarities include (1) the criminal nature of both statutes, (2) the non-commercial nature of both statutes, (3) the lack of a jurisdictional requirement that some effect on interstate commerce is involved in each case, (4) the remoteness of any effect on commerce, and (5) the excessive congressional power that would logically follow from permitting both statutes based on the Commerce Clause.

a. Possible Differences

A close look at the possible differences reveals that they are insignificant and that the possible differences often point to similarities instead of differences. First, whereas no congressional findings were before the *Lopez* Court connecting the relevant activity to interstate commerce, congressional findings which support that violence against women affects interstate commerce are currently before this Court. As the *Lopez* Court pointed out, however, such findings are not nec-

essary. *Id.* at ——, 115 S. Ct. at 1631 (citations omitted). The Court only found the missing findings relevant in that the findings would have enabled the Court "to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye. . . ." *Id.* at ——, 115 S. Ct. at 1632. Having said that, the Court noted that the amended § 922(q) included congressional findings regarding the effects upon interstate and foreign commerce of firearm possession in and around schools. *Id.* at —— n. 4, 115 S. Ct. at 1632 n. 4. If the Court felt that such findings were extremely important, i.e. that the Court did not have a sufficient awareness of the effects absent the findings, then the Court could have considered the added congressional findings even in the face of the Government's statement that it was not relying on the added findings "in the strict sense of the word," but that "at a very minimum [the findings] indicate that reasons can be identified for why Congress wanted to regulate this particular activity." *Id.* The fact that an attorney made an ambiguous statement possibly indicating a minimal reliance on congressional findings does not preclude a court from considering these findings.

Regardless, even absent the express congressional findings, the *Lopez* Court had a sufficient knowledge of interstate commercial effects to consider. The commerce power is based on a reasonable effect on interstate commerce, not on Congress's perceived effect on commerce. While the effects on commerce in *Lopez* were not obvious because they were so tenuous, undoubtedly the Court could fairly easily infer the effects in order to make a reasonable determination whether

these effects were substantially related to commerce. Also, as listed in the appendix to *Lopez*, the Court had much authority to consider regarding the issue. *See id.* at —— - ——, 115 S. Ct. at 1665- 1671. More importantly, the Government actually presented the commercial effects in its argument, and the Court considered whether these sufficed.

In sum, the fact that the effects need not be inferred in the case at hand is not a very important difference. Congress need not make findings, the *Lopez* Court had access to Congress's added findings, the *Lopez* Court had a reasonable appreciation of the effects via reasonable inferences, the authority in the appendix, and the Government's argument, and the *Lopez* Court thoroughly considered the effects presented. The fact that Congress's findings were not stressed in the Government's argument is somewhat incidental, and it appears that the Court mentioned this simply as one feather with which to fill an already full pillow. While findings will often be helpful, findings are not necessary for a determination of whether a rational relation to interstate commerce exists.

Second, the statute at issue is civil, whereas *Lopez* involved a criminal statute. This is technically a correct statement, however, VAWA is criminal in nature. VAWA was designed to address problems in the state criminal justice system, and, in attempting to supplement deficiencies in the state criminal system, it creates a civil cause of action that seeks to vindicate a criminal act. It provides a civil remedy for a "crime of violence," which is defined in part as "an act or series of acts that would constitute a felony against the person or that would constitute a felony against property if the

conduct presents a serious risk of physical injury to another." 42 U.S.C. § 13981(d)(2)(A). A person liable under the act "shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate." 42 U.S.C. § 13981(c). Regardless, whether a statute based on the Commerce Clause is civil or criminal is of limited relevance. With statutes regulating intrastate activities, the primary concern is whether the activity is economic. Other than the economic nature of the activity to be regulated, the focus is not on the nature of the activity but on the related issue of the effects of the regulated activity on interstate commerce.

Third, the steps of causation in the instant case are fewer than in *Lopez*. At best, an analysis of the steps of causation is an inexact science; the number of steps depends on how each step is defined, and a greater number of steps does not always indicate greater remoteness. Certainly this should not be the method for resolving Commerce Clause issues. In *Lopez*, the Government argued and the Court considered two general chains of causation. First, the possession of a firearm in a school zone may result in violent crime which may affect the national economy through either increased nationwide costs or a reduction in the willingness of individuals to travel to areas within the country that are perceived to be unsafe. Second, guns pose a substantial threat to the educational process by threatening the learning environment, and a handicapped educational environment leads to a less productive citizenry which affects the national economy.

While the problems inherent in a step of causation analysis are compounded when comparing two different laws, comparing the steps in the case at hand to *Lopez* is helpful. Compared with *Lopez's* first chain of causation, the case at hand possibly involves one less step than the postulated effects in *Lopez*. In the case at hand, the regulated activity is the violent crime, whereas in *Lopez* the regulated activity was an act that could lead to a violent crime. This distinction is not enough to apply the commerce power in the case at hand. The step from possession of a firearm in schools to the commission of a violent crime is a small step. Undoubtedly, often possession of a firearm leads to violent crime. Also, no violent crime is necessary to create an effect on commerce; the fear created solely by the possession of the guns undoubtedly somewhat affects commerce. Finally, the individual steps that each case has in common may be longer in the case at hand than in *Lopez*.

Lopez's second chain of causation is similar to plaintiff's argument that violent crimes against women affect the productivity of the nation by distracting women and by removing women from the workplace. Similarly, guns at schools affect the productivity of the nation by threatening the learning environment. It is a fair inference that guns at schools are distracting and dissuade many students from attending schools. This chain also involves one less step. Guns affect learning, an effect which in turn affects job performance, which in turn affects the national economy, which in turn affects interstate commerce. In the case at hand, violence against women affects job performance, which in turn affects the national economy, which in turn affects interstate commerce. Again the one less step in the case at hand is unimportant. It is far from clear that

the distance from the first to the last step is greater in the *Lopez* chain of causation than in the case at hand's chain.

The bottom line is that both *Lopez* and the case at hand involve regulated activity that is too remote from interstate commerce. Any substantial distinction between the lengths of the chains of causation in *Lopez* and the lengths of the chains in the case at hand is inconsequential. As mentioned, the steps of causation analysis is an inexact science, a formalistic framework upon which no heavy reliance should be placed. In the end, the important issue is the proximity of the regulated activity to commerce, not the number of steps. The proximity between the regulated activity and commerce in the case at hand is similar to the proximity in *Lopez*, and any distinction between the two is based on insignificant differences and on differences which are impossible to comprehend with reasonable certainty. Even accepting the step analysis as helpful and accepting that the case at hand involves fewer steps than the situation in *Lopez*, both situations involve regulated activity which is too remote from interstate commerce.

b. Similarities (Other Than Those in the Possible Differences Section)

Unlike the differences, the similarities between *Lopez* and the case at hand are real and significant. First, of major importance is that VAWA involves intrastate activity which is not commercial or even economic in nature. Any interstate nature of VAWA is insignificant. VAWA regulates local criminal activity. It does not regulate the growth of crops, the shipment of goods, or other similar economic activities. In line

with *Lopez*, whether a statute regulates intrastate activity which is economic in nature is a consideration. *See Lopez*, 514 U. S. at ——- - ——, 115 S. Ct. at 1630-1631. In *Jane Doe v. John Doe*, 929 F. Supp. 608 (D.Conn.1996), the only other opinion I am aware of that addresses this issue to date, the court upheld the constitutionality of VAWA under the Commerce Clause. The court compared the situation in *Wickard* to VAWA. As mentioned, the *Wickard* Court upheld the application of the Agricultural Adjustment Act to home-consumed wheat, stating, "It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions." *Wickard*, 317 U. S. at 128, 63 S. Ct. at 91. Analyzing VAWA in light of *Wickard*, the *Doe* court concluded:

> Certainly the repetitive nationwide impact of women withholding, withdrawing or limiting their participation in the workplace or marketplace in response to or as a result of gender-based violence or the threat thereof, is of such a nature to be as substantial an impact on interstate commerce as the effect of excess "home grown" wheat harvesting which was found to have been properly regulated by Congressional enactment.

Doe, 929 F. Supp. at 614 (citation omitted). This analysis is contrary to *Lopez*, which, as discussed, distinguished the *Wickard* case, in which the regulated activity was economic in nature, from cases such as the case at hand and *Lopez*, in which the regulated activity is in no way economic in nature. *Lopez* teaches that cases in which the statute at issue regulates intrastate activity which is economic in nature are analyzed differently from cases involving non-economic intrastate activity.

After *Lopez*, reliance on *Wickard* to analyze the commerce power in a case involving a non-economic intrastate activity is not tenable.[2] In addition to *Wickard*, the other cases upon which plaintiff relies heavily are all distinguishable as cases involving economic activity. *See Lopez*, 514 U. S. at ——, 115 S. Ct. at 1630 (listing the following as cases involving congressional acts regulating intrastate economic activity: *Hodel*, 452 U. S. 264, 101 S. Ct. 2352, 69 L.Ed.2d 1 (1981) (involving intrastate coal mining); *Perez v. United States*, 402 U. S. 146, 91 S. Ct. 1357, 28 L.Ed.2d 686 (1971) (involving intrastate extortionate credit transactions); *Katzenbach v. McClung*, 379 U. S. 294, 85 S. Ct. 377, 13 L.Ed.2d 290 (1964) (involving restaurants utilizing substantial interstate supplies); and *Heart of Atlanta Motel*, 379 U. S. 241, 85 S. Ct. 348, 13 L.Ed.2d 258 (1964) (involving inns and hotels catering to interstate guests)).

Second, similar to § 922(q), VAWA does not have a jurisdictional requirement limiting each individual case under VAWA to situations involving interstate commerce. Although it is unclear whether such a jurisdictional requirement is needed, indications exist that

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[2] The *Doe* court also based its holding partly on the conclusion that *Lopez's* practical implications analysis was *dicta*. *See Doe*, 929 F. Supp. at 613. Counsel for defendants disagree, as do I. However, if this analysis was in fact *dicta*, this would not help the position of the *Doe* court. If the practical implications analysis was unimportant, this would only bolster the importance of the nature of the regulated activity analysis and of the individual case jurisdictional requirement analysis and would increase the likelihood that, if intrastate activity is non-economic in nature and if no requirement exists mandating a connection to commerce in each case, then Congress cannot regulate the activity under the commerce power.

such a requirement may be necessary. Congress has often placed such a requirement in legislation similar to VAWA. *See Cleveland v. United States*, 329 U. S. 14, 67 S. Ct. 13, 91 L.Ed. 12 (1946) (discussing the Mann Act, which made an offense the transportation in interstate commerce of any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose). In *United States v. Bass*, 404 U. S. 336, 92 S. Ct. 515, 30 L.Ed.2d 488 (1971), respondent had been convicted for possession of firearms under Title VII of the Omnibus Crime Control and Safe Streets Act of 1968, which mandated punishment for any convict "who receives, possesses, or transports in commerce or affecting commerce . . . any firearm." *Id.* at 337, 92 S. Ct. at 517. There was no attempt to show that respondent had possessed the firearms "in commerce or affecting commerce," and the prosecution had proceeded on the assumption that such connection to commerce was necessary only for the transport element of the statute, not for possession. *Id.* at 338, 92 S. Ct. at 517-518. The Court of Appeals reversed respondent's conviction, finding that if it accepted the prosecution's interpretation of the statute, then there would be substantial doubt as to the statute's constitutionality. *Id.* (citation omitted). The Supreme Court affirmed, but for different reasons, applying the interstate commerce requirement to receiving, possessing, or transporting a firearm. The Court reasoned that ambiguity in criminal statutes should be resolved in favor of lenity, *Id.* at 347, 92 S. Ct. at 522, and that ambiguity should be resolved in favor of not significantly changing the federal-state balance. *Id.* at 349, 92 S. Ct. at 523.

Third, similar to the situation in *Lopez*, permitting VAWA as a constitutional exercise of the commerce power would have the practical result of excessively extending Congress's power and of inappropriately tipping the balance away from the states. The *Lopez* Court placed much importance on the practical implications of permitting § 922(q) under the Commerce Clause. The practical implications in the case at hand are very similar.

A reasonable inference from the congressional findings is that violence against women has its major effect on the national economy. Congress focused on the effect on the national economy, and a reasonable inference, based both on Congress's focus and common sense, is that the effects on interstate travel are incidental. Showing that something affects the national economy does not suffice to show that it has a substantial effect on interstate commerce. Plaintiff uses "effects on the national economy" interchangeably with "effects on interstate commerce." This is wrong. Undoubtedly effects on the national economy in turn affect interstate commerce. Such a chain of causation alone, however, is insufficient to bring an act within the purview of the commerce power. If such a chain of causation sufficed, Congress's power would extend to an unbounded extreme. Defendants point out that facts show that insomnia costs the United States $15 billion a year (citing 2 Nat'l Comm'n On Sleep Disorders Research, *Wake Up America: A National Sleep Alert* (submitted to the U. S. Congress and the Secretary of Health and Human Services), 125-133 (1994)). This is as much as the yearly cost of domestic abuse. Other sources indicate that the cost of insomnia is much higher. *See* 140 Cong. Rec. S. 14211-01, *The Economics*

of Insomnia (daily ed. Oct. 5, 1994) (statement of Sen. Hatfield) (stating that a source indicates that the estimated annual economic cost of insomnia due to reduced productivity, accidents, and medical problems is between $92.5 and $107.5 billion). Insomnia undoubtedly also has some effect on interstate travel as insomniacs travel across state lines for treatment (e.g., to the nationally-renowned Johns Hopkins Sleep Disorder Center in Maryland). Insomniacs buy medicine which has traveled across state lines. Family law issues and most criminal issues affect the national economy substantially and in turn have some effect on interstate commerce. These too have interstate travel implications. However, to extend Congress's power to these issues would unreasonably tip the balance away from the states.

The fact that Congress limited VAWA, in stating that VAWA does not "confer on the courts of the United States jurisdiction over any State law claim seeking the establishment of a divorce, alimony, equitable distribution of marital property, or child custody decree," 42 U.S.C. § 13981(e)(4), is utterly insignificant to the practical implications of accepting the regulated activity as having a substantial effect on interstate commerce. It is the logic on which Congress based its commerce power that is important. If the justification for VAWA under the Commerce Clause is constitutionally acceptable, then certainly Congress would have power to regulate much activity which should be left to state control. Similar to the situation in *Lopez*, if I accepted plaintiff's argument, I would be "hard-pressed to posit any activity by an individual that Congress is without power to regulate." *Lopez*, — U. S. at ——, 115 S. Ct. at 1632. In essence, if VAWA is a per-

missible use of the commerce power because of the regulated activity's effect on the national economy, which in turn affects interstate commerce, then it would be inconsistent to deny the commerce power's extension into family law, most criminal laws, and even insomnia.

The combination of the insignificance of the differences between the case at hand and *Lopez* and the significance of the similarities leads to the conclusion that Congress acted beyond its commerce power in enacting VAWA. Any other conclusion would strain reason. As Justice Scalia recently stated regarding the Supreme Court, "[W]e expect both ourselves and lower courts to adhere to the 'rationale upon which the Court based the results of its earlier decisions.'" *United States v. Virginia*, — U. S. ——, ——, 116 S. Ct. 2264, 2305, 135 L.Ed.2d 735 (Scalia, J., dissenting) (quoting *Seminole Tribe of Fla. v. Florida*, — U. S. ——, —— - ——, 116 S. Ct. 1114, 1128-1129, 134 L.Ed.2d 252 (1996)). A reasonable adherence to *Lopez* reveals that VAWA is not a proper use of the commerce power.

B. The Enforcement Clause

The Fourteenth Amendment states in part, "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U. S. Const., amend. XIV, § 1. It also states, "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U. S. Const., amend. XIV, § 5.

1. Some Public Involvement Needed

The Supreme Court has explicitly stated that the Fourteenth Amendment regulates only state action and that some state involvement is necessary. *See, e.g., Civil Rights Cases*, 109 U. S. 3, 11, 3 S. Ct. 18, 21, 27 L.Ed. 835 (1883) (stating that an "[i]ndividual invasion of individual rights is not the subject matter of the [Fourteenth A]mendment"); *Shelley v. Kraemer*, 334 U. S. 1, 13, 68 S. Ct. 836, 842, 92 L.Ed. 1161 (1948) (stating that the Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful"); *United States v. Guest*, 383 U. S. 745, 755, 86 S. Ct. 1170, 1176, 16 L.Ed.2d 239 (1966) (opinion of Stevens, J.) ("It is a commonplace that rights under the Equal Protection Clause itself arise only where there has been involvement of the State or of one acting under the color of its authority"); *Bray v. Alexandria Women's Health Clinic*, 506 U. S. 263, 352-355, 113 S. Ct. 753, 802-804, 122 L.Ed.2d 34 (1993) (O'Connor, J., dissenting).

> Careful adherence to the "state action" requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. It also avoids imposing on the State, its agencies or officials, responsibility for conduct which they cannot fairly be blamed.

Lugar v. Edmondson Oil Co., 457 U. S. 922, 936, 102 S. Ct. 2744, 2753, 73 L.Ed.2d 482 (1982). The Fourteenth Amendment states, "*No state* . . . shall deny to any person within its jurisdiction the equal protection of the laws." U. S. Const., amend. XIV, § 1 (emphasis added).

The legislative history behind the Fourteenth Amendment indicates that the congressional framers were concerned with private encroachment on civil rights. *See* Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 Mich. L. Rev. 1323, 1329-1330 (1952). However, by holding that the Fourteenth Amendment applies to private conduct with a certain connection to state action, the Fourteenth Amendment can still reach some private conduct. But Supreme Court precedent and, moreover, the language of the Fourteenth Amendment require that some state involvement is necessary, even though it may be tangential.

Some authority indicates that Congress may address purely private conduct *via* § 5 of the Fourteenth Amendment in spite of the fact that § 1 actions require state action. In *Guest*, while Justice Stevens' opinion of the Court mandated some public involvement for Congress's use of the power granted by § 5 of the Fourteenth Amendment, six justices agreed that no state action was necessary for Congress's use of § 5. 383 U. S. at 762, 774-786, 86 S. Ct. at 1180, 1186-1193; *see also*, *District of Columbia v. Carter*, 409 U. S. 418, 93 S. Ct. 602, 34 L.Ed.2d 613 (1973) (opinion of Brennan, J.) (stating first, "The Fourteenth Amendment itself 'erects no shield against merely private conduct, however discriminatory or wrongful,'" *id.* at 423-424, 93 S. Ct. at 606 (quoting *Shelley v. Kraemer*, 334 U. S. at 13, 68 S. Ct. at 842), then stating in a footnote, "This is not to say, *of course*, that Congress may not proscribe purely private conduct under § 5 of the Fourteenth Amendment." *Id.* at 424 n. 8, 93 S. Ct. at 606 n. 8 (emphasis added)). Although Congress has certain discretion under § 5, the idea that Congress can address

purely private conduct under § 5 is contrary to both the language of the Fourteenth Amendment and the *Civil Rights Cases*, 109 U. S. 3, 11, 3 S. Ct. 18, 21, 27 L.Ed. 835 (1883) (stating that § 5 permits Congress only to "adopt appropriate legislation for correcting the effects of such prohibited State laws and State acts, and thus to render them effectively null, void, and innocuous"). The Court has stressed that, even in the face of conflicting Supreme Court decisions, lower courts are not to assume that Supreme Court precedent has been implicitly overruled, *see Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 1921-1922, 104 L.Ed.2d 526 (1989), and the Court has cited the *Civil Rights Cases* approvingly as recently as 1982. *See Lugar*, 457 U.S. at 936, 102 S. Ct. at 2753.

2. *Morgan*

Even though state action was not at issue in *Katzenbach v. Morgan*, 384 U. S. 641, 86 S. Ct. 1717, 16 L.Ed.2d 828 (1966), the plaintiff relies primarily on the sweeping language of *Morgan* in support of her position that the Fourteenth Amendment reaches private conduct. In *Morgan*, the Court considered whether § 4(e) of the Voting Rights Act of 1965 was constitutional under § 5 of the Fourteenth Amendment. Section 4(e) provided in relevant part that no person who successfully completed the sixth grade in public or private school in Puerto Rico in which the language of instruction was other than English shall be denied the right to vote because of an inability to read or write English. *Id.* at 643, 86 S. Ct. at 1719. Appellees in the case challenged § 4(e) in that it prohibited the enforcement of the election laws of New York, which required

an ability to read and write English as a condition of voting. *Id.* at 643-644, 86 S. Ct. at 1719-1720. Appellees attacked § 4(e) because it enabled many New York residents to vote who could not previously vote under the New York law. *Id.* at 644-645, 86 S. Ct. at 1720. The Court held that § 4(e) was a proper exercise of the powers granted to Congress by § 5 of the Fourteenth Amendment, and, by force of the Supremacy Clause, the New York English literacy requirement could not be enforced to the extent that it was inconsistent with § 4(e). *Id.* at 646-647, 86 S. Ct. at 1721. The Court stated, "A construction of § 5 that would require a judicial determination that the enforcement of the state law precluded by Congress violated the [Fourteenth] Amendment, as a condition of sustaining the congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment." *Id.* at 648, 86 S. Ct. at 1722. The Court's task was not to determine "whether the New York English literacy requirement as applied to deny the right to vote to a person who successfully completed the sixth grade in a Puerto Rico school violate[d] the Equal Protection Clause." *Id.* at 649, 86 S. Ct. at 1722-1723. Instead, the Court's task was to determine whether § 4(e) was "as required by § 5, appropriate legislation to enforce the Equal Protection Clause." *Id.* at 649-650, 86 S. Ct. at 1723.

The Court noted that § 5 has a broad scope. *Id.* at 650, 86 S. Ct. at 1723. "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *Id.* (quoting *M'Culloch v. Maryland*, 17 U. S. (4 Wheat.)

316, 421, 4 L.Ed. 579 (1819)). Therefore, the test is (1) whether a statute "may be regarded as an enactment to enforce the Equal Protection Clause, [(2)] whether it is 'plainly adapted to that end' and [(3)] whether it is not prohibited by but is consistent with 'the letter and spirit of the constitution.'" *Id.* at 651, 86 S. Ct. at 1724 (quoting *M'Culloch*, 17 U. S., (4 Wheat.) at 421).

Regarding the first requirement, the Court stated, "There can be no doubt that § 4(e) may be regarded as an enactment to enforce the Equal Protection Clause." *Id.* at 652, 86 S. Ct. at 1724. Congress "explicitly declared" that it enacted § 4(e) to secure rights under the Fourteenth Amendment, and "§ 4(e) may be viewed as a measure to secure for the Puerto Rican community residing in New York nondiscriminatory treatment by government." *Id.* Regarding the second requirement, the Court indicated that § 4(e) "may be readily seen as 'plainly adapted'" to furthering aims of the Equal Protection Clause. *Id.* Section 4(e) in effect "prohibit[s] New York from denying the right to vote to large segments of its Puerto Rican community" and thus enhances the Puerto Rican community's political power, which in turn "will be helpful in gaining nondiscriminatory treatment in public services for the entire Puerto Rican community." *Id.* at 652, 86 S. Ct. at 1724. "Section 4(e) thereby enables the Puerto Rican minority better to obtain 'perfect equality of civil rights and the equal protection of the laws.'" *Id.* at 652-653, 86 S. Ct. at 1724-1725. Therefore, *Morgan* involved state action (New York's statute) which caused an infringement on Fourteenth Amendment rights.

The extent of *Morgan*'s applicability to the case at hand is limited. In *Morgan*, Congress's statute in-

validated a state statute and thereby remedied equal protection violations. 384 U. S. at 652-653, 86 S. Ct. at 1724-1725. Reasonably *Morgan* is limited to situations where Congress acted against state action which caused a denial of equal protection, and *Morgan* does not permit Congress to act against purely private action incidentally giving rise to state action which causes a denial of equal protection. However, *Morgan* is distinguishable on other grounds as well, as will be discussed.

3. VAWA

VAWA has two general purposes. It was enacted to attack gender-motivated crime against women and to supplement deficiencies in the state criminal justice system. First, VAWA adds to state systems a remedy for the bias element of gender-motivated violent crimes against women. VAWA "attacks gender-motivated crimes that threaten women's equal rights," taking "aim at gender discrimination prohibited under the [Thirteenth] Amendment." S. Rep. No. 197, 102d Cong., 1st Sess. 53 (1991).[3] "State and Federal criminal laws do not adequately protect against the bias element of crimes of violence motivated by gender." H.R. Rep. No. 711, 103d Cong., 2d Sess. 385 (1994), U. S. Code Cong. & Admin. News 1801, 1853. The Senate found,

> [w]here a crime is shown to be motivated by gender bias, a different interest is implicated; one not adequately addressed by State tort law alone. The civil

[3] The fact that Congress based this in part on gender discrimination "prohibited under the [Thirteenth] Amendment" illustrates the straw grasping in which Congress engaged. The Thirteenth Amendment applies to racial, not gender, discrimination.

> rights action provided by [T]itle III has the entirely different function of providing a special societal judgment that crimes motivated by gender bias are unacceptable because they violate the victims' civil rights. Title III singles out for enhancement bias-inspired conduct because of the unique individual and societal harm it causes. For example, the supreme [sic] Court has recognized that bias crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest. Quoting Blackstone, "'it is but reasonable that among crimes of different natures those should be most severely punished which are the most destructive of the public safety and happiness.'"

S. Rep. No. 138, 103d Cong., 1st Sess. 50 (1993) (footnotes omitted).

Second, purportedly VAWA "provides a 'necessary' remedy to fill the gaps and rectify the biases of existing State laws." S. Rep. No. 197 at 53. "In many States, rape survivors must overcome barriers of proof and local prejudice that other crime victims need not hurdle; they bear the burden of painful and prejudicial attacks on their credibility that other crime victims do not shoulder; they may be forced to expose their private life and intimate conduct to win a damage award unlike any other civil litigant; and, finally, in some cases, they are barred from suit altogether by tort immunity doctrines and marital exclusions." *Id.* at 53-54. State and federal criminal laws do not "adequately provide victims of gender-motivated crimes the opportunity to vindicate their interests; existing bias and discrimination in the criminal justice system often de-

prives victims of crimes of violence motivated by gender of equal protection of the laws and the redress to which they are entitled." H.R. Rep. No. 711, 103d Cong., 2d Sess. 385 (1994), U. S. Code Cong. & Admin. News 1801, 1853. "Study after study has concluded that crimes disproportionately affecting women are often treated less seriously than comparable crimes affecting men." *Id.* (footnote omitted). The state criminal systems are inadequate at the police, the prosecution, and the judicial levels. *See Violence Against Women, Hearing Before the House Subcommittee on Crime and Criminal Justice*, 102d Cong., 2d Sess. 70-82 (1992) (statement and prepared statement of Margaret Rosenbaum, Assistant State Attorney, Miami, Fla.); H.R. Rep. 395, 103d Cong., 1st Sess. 27-28 (1993).

Congress has wide latitude under the Fourteenth Amendment. "Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Morgan*, 384 U.S. at 651, 86 S. Ct. at 1723-1724. Despite this broad power, Congress's acts must have some reasonable possibility of addressing a legitimate equal protection concern. Otherwise, Congress's power under the Fourteenth Amendment would be absolute. In *Morgan*, the Court found that Congress's statute "enable[d] the Puerto Rican minority better to obtain 'perfect equality of civil rights and the equal protection of the laws.'" 384 U. S. at 653, 86 S. Ct. at 1724. Implicit in this finding is that, at the least, in order for Congress to act under § 5, there must be some reasonable possibility that Congress's act is a legitimate means for remedying a legitimate end (i.e., a legitimate remedy for a legitimate equal protection concern). With respect to VAWA, I will discuss (1) whether Congress's ends are legitimate and, if so, (2) whether Congress's means are legitimate.

a. Whether Congress's Ends Are Legitimate

As stated, Congress had two ends in mind in drafting VAWA: (1) to remedy private individuals' gender-based violence and (2) to remedy gender-based deficiencies in the states' criminal justice systems.

i. To Remedy Private Individuals' Violence

First, regarding the purpose to create a cause of action against the criminal discriminator, sufficient contacts to state action do not exist to give rise to a legitimate equal protection concern. If state action were sufficiently connected to a criminal's discriminating acts, a legitimate equal protection concern would exist. However, no such sufficient connection exists.

"[T]he involvement of the State need [not] be either exclusive or direct. In a variety of situations the Court has found state action of a nature sufficient to create rights under the Equal Protection Clause even though the participation of the State was peripheral, or its action was only one of several co-operative forces leading to the constitutional violation." *Guest*, 383 U. S. at 755-756, 86 S. Ct. at 1177 (citations omitted). Conduct allegedly causing the deprivation of a federal right must be fairly attributable to the state. *Lugar*, 457 U. S. at 937, 102 S. Ct. at 2753. Conduct causing the deprivation of a federal right may be fairly attributable if (1) "the deprivation [is] caused by the exercise of some right or privilege created by the State or by a rule of conduct

imposed by the State or by a person for whom the state is responsible" or if (2) "the party charged with the deprivation [is] a person who may fairly be said to be a state actor" (because, for example, "he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State"). *Id.* (citations omitted).

A private individual's gender-based violent crime against a woman does not qualify for either category. The deprivation caused by private individuals who commit crimes against women due to gender is not caused by the exercise of some right or privilege created by the state or by a rule of conduct imposed by the state or by a person for whom the state is responsible. Certainly the state is not responsible in any relevant sense for individuals who commit violent crimes against women. Even with the inadequate criminal remedy for gender-motivated crimes against women, the states do not permit individuals to commit violent gender-motivated acts against women. The state action at issue (the inadequacies in the state criminal systems) does not cause, or, in any significant manner, even contribute to, the deprivation caused by the individual criminal. The private individual's decision to discriminate by committing a gender-based violent act against a woman cannot be ascribed to any governmental decision. *Cf. id.* at 938, 102 S. Ct. at 2754 (citing *Moose Lodge No. 107 v. Irvis*, 407 U. S. 163, 92 S. Ct. 1965, 32 L.Ed.2d 627 (1972)). Such acts are unlawful both under state criminal and state tort laws, and, even if the states pursue their criminal laws against rape and domestic abuse less vigorously than other laws, the Court has held that if an act is unlawful, then it cannot be ascribed

to any governmental decision. *See id.* at 940, 102 S. Ct. at 2755 (to say that conduct is unlawful under state law "is to say that the conduct of which petitioner complained could not be ascribed to any governmental decision; rather, respondents were acting contrary to the relevant policy articulated by the State").

The private individual criminal is also not a person who may fairly be said to be a state actor. The targets of VAWA are not state officials, but instead are the individual criminals; these targets have not acted together with or obtained significant aid from state officials; and the criminal conduct is not otherwise chargeable to the state. No possibility exists that VAWA defendants obtained significant aid from the state criminal justice systems' deficiencies in the commission of the discriminatory violent crimes. A rapist who rapes in part due to a woman's gender commits one act of discrimination, and deficiencies in the state criminal system effect a separate act of discrimination. Two separate acts of discrimination occur. The rapist does not rely on the state in any real sense as an accomplice to his act of discrimination. The state action related to VAWA is distinct from the discriminatory act of the private individual.

In *Guest*, the prosecutor had alleged in part in an indictment that six private individual defendants had conspired to

> injure, oppress, threaten, and intimidate Negro citizens of the United States in the free exercise and enjoyment of: "The right to the equal utilization, without discrimination upon the basis of race, of public facilities in the vicinity of Athens, Georgia,

> owned, operated or managed by or on behalf of the State of Georgia or any subdivision thereof."

383 U. S. at 753, 86 S. Ct. at 1175. The Court considered whether the cause of action, based on the Fourteenth Amendment, had to be dismissed because the indictment named no one alleged to have acted under the color of state law, and because "[t]he Equal Protection Clause speaks to the State or to those acting under the color of its authority." *Id.* at 754, 86 S. Ct. at 1176.

> [T]he indictment in fact contain[ed] an express allegation of state involvement sufficient at least to require the denial of a motion to dismiss. One of the means of accomplishing the object of the conspiracy, according to the indictment, was "By causing the arrest of Negroes by means of false reports that such Negroes had committed criminal acts."

Id. at 756, 86 S. Ct. at 1177 (footnote omitted). Three members of an earlier Court had expressed the view that a private businessman's invocation of state police and judicial action to carry out his own policy of racial discrimination was sufficient to create equal protection rights in those against whom the racial discrimination was directed. *Id.* (citing *Bell v. Maryland*, 378 U. S. 226, 242-286, 84 S. Ct. 1814, 1823-1847, 12 L.Ed.2d 822 (1964) (in *Bell*, Maryland police had arrested black students, and a Maryland court had convicted the students for participating in a sit-in. The students had appealed their conviction to the Supreme Court)). From the facts alleged in the indictment in *Guest*, it was possible that state officials engaged in no more than cooperative private and state action similar to that in *Bell*, but it was also possible that agents of the state

actively participated in discrimination. *Id.* at 756-757, 86 S. Ct. at 1176-1177.

Unlike the statute involved in *Guest*, as exemplified by the possible extent of complicity between the state and private actors in the facts of *Guest*, there is no real possible complicity between the state criminal justice system and private actors in VAWA actions. In fact, the congressional findings do not mention such complicity. Theoretically there could be some complicity in that both the state and the criminal may discriminate against the female victim. The two acts of discrimination, however, are separate, and no indication exists that the state inaction or inadequate action against the criminal helps or encourages the criminal to commit his gender-based act of violence.

In *Shelley v. Kraemer*, 334 U. S. 1, 68 S. Ct. 836, 92 L.Ed. 1161 (1947), the Court considered the validity of state courts' enforcement of private restrictive covenants having as their purpose the exclusion of blacks from the ownership or occupancy of real property. *Id.* at 4, 68 S. Ct. at 838. Blacks had occupied property subject to the restrictive covenants, and the state courts enforced the restrictive covenants, requiring the blacks to leave the property. *Id.* at 5-6, 68 S. Ct. at 838-839. The Supreme Court held that the state courts' enforcement of the restrictive covenants was sufficient state action.

It is clear that but for the active intervention of the state courts, supported by the full

> panoply of state power, petitioners would have been free to occupy the properties in question without

> restraint. These are not cases, as has been suggested, in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell.

Id. at 19, 68 S. Ct. at 845.

The situation at hand differs from *Shelley* in two respects. First, the state criminal systems' insufficient treatment of perpetrators of violence against women is "merely abstaining from action" and lacks the active intervention attributed to the state courts' actions in *Shelley*. It is the state systems' inaction or inadequate action towards the violent criminals which concerned Congress. Second, unlike in *Shelley*, with VAWA no possibility exists that but for the state's inadequate action, the criminals would not commit the discriminatory crimes.

In *Flagg Bros., Inc. v. Brooks*, 436 U. S. 149, 98 S. Ct. 1729, 56 L.Ed.2d 185 (1978), the plaintiff had been evicted from her apartment, and the city marshal had arranged for the plaintiff's possessions to be stored by Flagg Brothers in its warehouse. *Id.* at 153, 98 S. Ct. at 1732. Plaintiff disputed her moving and storage costs, and Flagg Brothers undertook to enforce its warehousemen's lien which was created by New York Uniform Commercial Code § 7-210. *Id.* at 151 n. 1, 153, 98

S. Ct. at 1731 n. 1, 1732. The Second Circuit found that because the state statute had created the lien which permitted a private individual to, in effect, violate the due process clause, there was sufficient state involvement to satisfy the state action requirement. *Id.* at 154-155, 98 S. Ct. at 1732-1733. The Supreme Court disagreed, stating,

> While as a factual matter any person with sufficient physical power may deprive a person of his property, only a state or private person whose actions "may be fairly treated as that of the state itself" . . . may deprive him of "an interest encompassed within the Fourteenth Amendment's protection."

Id. at 157, 98 S. Ct. at 1734 (citations omitted).

> This Court . . . has never held that a State's mere acquiescence in a private action converts that action into that of the State. . . . [Certain] cases clearly rejected the notion that our prior cases permitted the imposition of Fourteenth Amendment restraints on private action by the simple device of characterizing the State's inaction as "authorization" or "encouragement."

Id. at 164-165, 98 S. Ct. at 1737-1738 (citations omitted). The Court found that there was a "total absence of overt official involvement," *id.* at 157, 98 S. Ct. at 1734 (citations omitted), in spite of the fact that state officials had passed § 7-210. "It would intolerably broaden, beyond the scope of any of our previous cases, the notion of state action under the Fourteenth Amendment to hold that the mere existence of a body of property law in a State, whether decisional or statutory, itself amounted to 'state action' even though no state process or state officials were ever involved in enforc-

ing that body of law." *Id.* at 160 n. 10, 98 S. Ct. at 1735 n. 10.

VAWA is unlike *Flagg Brothers* in that VAWA involves active current decisions by state actors and in that VAWA involves the method of enforcement of laws as well as the bodies of laws themselves. However, more relevantly, similar to *Flagg Brothers*, VAWA involves state inaction or inadequate action towards the individual causing the deprivation, and VAWA involves no overt official involvement. Following the logic of *Flagg Brothers*, this is not authorization or encouragement of the deprivation.

In *Lugar*, the Court considered in part whether private individuals' use of state officials to take advantage of state-created attachment procedures constituted sufficient state action. *Lugar*, 457 U. S. at 942, 102 S. Ct. at 2756. The Court held that such joint participation between private individuals and the state sufficed to make the conduct fairly attributable to the state. *Id.* Due to the private party's joint participation with the state officials, the private party was a "state actor." *Id.* at 941-942, 102 S. Ct. at 2756. This is different from VAWA which involves situations where private individuals do not act together with or receive any significant aid from the state in the commission of the violent act.

Therefore, remedying private individuals' gender-based crimes is not a legitimate equal protection goal due to the fact that no sufficient state contacts exist.

ii. To Remedy Deficiencies in State System

Some possibility exists that at least part of the states' differential treatment of gender-based violent crimes against women is due to gender discrimination, and so correcting the differential treatment arising out of gender discrimination is a legitimate Fourteenth Amendment concern. Considering Congress's broad discretion, a legitimate equal protection concern exists within state criminal justice systems.

b. Whether Congress's Means Are Legitimate

As stated, Congress's purpose to remedy discrimination by private individuals who commit gender-based violent crime against a woman is an illegitimate Fourteenth Amendment end, and so addressing whether the means sufficiently address this end is unnecessary. In contrast, the purpose to remedy deficiencies in the state system is a legitimate end, but no reasonable possibility exists that VAWA will help remedy this legitimate Fourteenth Amendment concern.

The § 5 analysis scheme presented in *Morgan* focused on whether an act of Congress remedies a legitimate Fourteenth Amendment concern. In *Morgan* the Court found that Congress's act would remedy a legitimate equal protection concern. *Morgan*, 384 U. S. at 652-653, 86 S. Ct. at 1724-25. At least a reasonable possibility must exist that Congress's act remedies a legitimate Fourteenth Amendment concern. While remedying the state criminal system's deficiencies is a legitimate Fourteenth Amendment concern, VAWA does not address this concern, because VAWA provides no remedy for the deficiencies. It does not provide a remedy to the

victim for the denial of the victim's equal protection rights by either undoing or stopping the specific equal protection violation or by compensating the victim for the violation, nor does it provide a remedy against the Fourteenth Amendment violator.

Clearly VAWA does not undo or stop the violations in the states' criminal justice systems. Also, it does not adequately compensate victims for the denial of their equal protection rights. VAWA is tailored to remedy conduct other than the conduct giving rise to the equal protection concern. VAWA compensates victims for the violence directed against them because of their gender, not for the states' denial of equal protection. If in a certain case VAWA comes close to accurately remedying deficiencies in the states' systems, it is purely by chance. To illustrate the problem, clear examples exist whereby VAWA will not compensate victims for the states' denial of women's equal protection rights. The statute is overbroad: many women who do not suffer Fourteenth Amendment violations at the hands of the state system would still have a VAWA claim. A woman in a state with fair rape laws who is raped and whose rapist receives the maximum sentence may still have a VAWA claim. That woman may receive compensation via VAWA despite having suffered no denial of her equal protection rights. VAWA is also too narrow: many women who suffer clear violations of their Fourteenth Amendment rights would not have a VAWA remedy, because the crime was not based on the woman's gender. These women would not receive any compensation despite the fact that the states clearly denied them equal protection of the laws.

The aim of legislation to cure Fourteenth Amendment violations should be at the entity which causes the violation. In this case that entity is the states. VAWA does not address the states, which are the perpetrators of the Fourteenth Amendment violation; it is wholly silent about the conduct of the various states in their handling of rape and other violent crimes against women. Consequently, VAWA does nothing to discourage the Fourteenth Amendment violations which occur in the state criminal systems. Instead of addressing the Fourteenth Amendment violation by the states' criminal justice system, VAWA authorizes a cause of action against an individual who did not contribute in any real sense to the unequal treatment in the states' criminal justice systems. In *Guest*, the individuals subject to the cause of action had allegedly involved the state to deprive blacks of equal protection rights. The individuals and the state were possibly conspirators to deprive equal protection. The cause of action at issue in *Guest* was a remedy against possible Fourteenth Amendment violation perpetrators. Unlike *Guest*, the private acts which VAWA targets are incidental to the Fourteenth Amendment violation. Therefore, VAWA provides no remedy against the Fourteenth Amendment violation perpetrator.

No reasonable possibility exists that, in enacting VAWA, Congress has enforced the Fourteenth Amendment mandate that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U. S. Const., amend. XIV, § 1. No reasonable possibility exists that VAWA will remedy any legitimate Fourteenth Amendment concern.

VI. Conclusion

Without a doubt violence against women is a pervasive and troublesome aspect of American life which needs thoughtful attention. But Congress is not invested with the authority to cure all of the ills of mankind. Its authority to act is limited by the Constitution, and the constitutional limits must be respected if our federal system is to survive. Congress's reliance on the Commerce Clause and the Fourteenth Amendment to support its authority to enact VAWA is misplaced. This is not to say that Congress is powerless to address the problem of violence against women. A properly drafted statute within the parameters of the Fourteenth Amendment, as interpreted by the Supreme Court could certainly be crafted.

Although plaintiff states a claim under VAWA for purpose of Fed. R. Civ. P. 12(b)(6), VAWA is an unconstitutional exercise of Congress's power, unjustified under either the Commerce Clause or the Enforcement Clause of the Fourteenth Amendment. Consequently, defendants' motion to dismiss the VAWA claims with prejudice is granted. I decline to exercise supplemental jurisdiction over the state claims and dismiss these without prejudice pursuant to 28 U.S.C. § 1367(c)(3).

The clerk will enter an appropriate order.

For the reasons stated in the accompanying memorandum opinion, the Violence Against Women Act, 42 U.S.C. § 13981, claims against Antonio Morrison and James Crawford are dismissed with prejudice. The state claims are dismissed without prejudice. The case is dismissed. The Clerk is directed to remove the case

from the docket and to certify copies of this order and the accompanying memorandum opinion to all counsel of record.

APPENDIX D

Statutory provisions

42 U.S.C. 13981 provides:

Civil rights

(a) Purpose

Pursuant to the affirmative power of Congress to enact this part under section 5 of the Fourteenth Amendment to the Constitution, as well as under section 8 of Article I of the Constitution, it is the purpose of this part to protect the civil rights of victims of gender motivated violence and to promote public safety, health, and activities affecting interstate commerce by establishing a Federal civil rights cause of action for victims of crimes of violence motivated by gender.

(b) Right to be free from crimes of violence

All persons within the United States shall have the right to be free from crimes of violence motivated by gender (as defined in subsection (d) of this section).

(c) Cause of action

A person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) of this section shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.

(d) Definitions

For purposes of this section—[1]

(1) the term "crime of violence motivated by gender" means a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender; and

(2) the term "crime of violence" means—

(A) an act or series of acts that would constitute a felony against the person or that would constitute a felony against property if the conduct presents a serious risk of physical injury to another, and that would come within the meaning of State or Federal offenses described in section 16 of title 18, whether or not those acts have actually resulted in criminal charges, prosecution, or conviction and whether or not those acts were committed in the special maritime, territorial, or prison jurisdiction of the United States; and

(B) includes an act or series of acts that would constitute a felony described in subparagraph (A) but for the relationship between the person who takes such action and the individual against whom such action is taken.

(e) Limitation and procedures

(1) Limitation

Nothing in this section entitles a person to a cause of action under subsection (c) of this section for random acts of violence unrelated to gender or for acts that

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[1] So in original. The word "means" probably should appear after "(A)" below.

cannot be demonstrated, by a preponderance of the evidence, to be motivated by gender (within the meaning of subsection (d) of this section).

(2) No prior criminal action

Nothing in this section requires a prior criminal complaint, prosecution, or conviction to establish the elements of a cause of action under subsection (c) of this section.

(3) Concurrent jurisdiction

The Federal and State courts shall have concurrent jurisdiction over actions brought pursuant to this part.

(4) Supplemental jurisdiction

Neither section 1367 of Title 28 nor subsection (c) of this section shall be construed, by reason of a claim arising under such subsection, to confer on the courts of the United States jurisdiction over any State law claim seeking the establishment of a divorce, alimony, equitable distribution of marital property, or child custody decree.

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

Nos. 99-5, 99-29

IN THE
SUPREME COURT OF THE UNITED STATES

UNITED STATES, *Petitioner*,

v.

ANTONIO J. MORRISON AND JAMES LANDALE CRAWFORD, *Respondents*.

CHRISTY BRZONKALA, *Petitioner*,

v.

ANTONIO J. MORRISON AND JAMES LANDALE CRAWFORD, *Respondents*.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals
For The Fourth Circuit

BRIEF IN OPPOSITION TO THE PETITIONS FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a federal law that provides a civil remedy for a victim of a violent felony, perpetrated by a private individual motivated by an animus based upon gender, a law within Congress's power to regulate "commerce among the several states, with foreign nations, and with the Indian tribes"?

2. Is a federal law that provides a civil remedy for a victim of a violent felony, perpetrated by a private individual motivated by an animus based upon gender, a law within Congress's power to enforce the Constitutional provision stating that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws"?

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Respondents Antonio J. Morrison and James Landale Crawford submit this brief in opposition to the separate petitions for writ of certiorari by the United States ("U.S. Pet.") and Christy Brzonkala ("Brzonk. Pet.").

As set forth below, petitioners can supply one, and only one, legitimate reason for this Court to grant their petitions: the court below declared an act of Congress unconstitutional in the context of this case. The scope of Congressional authority to legislate under the Constitution is an important issue. But this Court's rules generally require more for an exercise of its discretionary jurisdiction, viz., a conflict between two or more courts of appeals or a departure from the "accepted and usual course" of judicial proceedings so as to warrant this Court's exercise of its supervisory powers. Sup. Ct. Rule 10. As shown below, no additional consideration is present here..

STATEMENT OF THE CASE

A. Allegations Of The Complaint

The order of the court below affirmed a judgment of the District Court dismissing the action upon a Rule 12(b)(6) motion for failure to state a claim. Accordingly, for purposes of this brief, Morrison and Crawford must assume the truth of the allegations set forth in the amended complaint (the "Complaint") in this action.

Brzonkala is a resident of Fairfax, Virginia. Complaint ¶ 7. The Complaint in this action alleges that Morrison and Crawford engaged in a sexual assault on Brzonkala "[o]n the night of September 21-22, 1994" in "a student room on the third floor" of Brzonkala's dormitory at Virginia Polytechnic Institute and State University ("Virginia Tech"). Complaint ¶ 13. It further alleges

that, after the assault, Morrison "clad only in his underwear followed wordlessly behind plaintiff" through the dorm building, from the third floor to Brzonkala's suite on the second floor. Complaint ¶ 23. Sometime within the next five months -- the Complaint does not say when -- Morrison reportedly was overheard in the dining hall saying "I like to get girls drunk and f**k the s**t out of them." Complaint ¶ 31. But the Complaint asserted that Brzonkala "reported that she was not inebriated at the time of the assaults." Complaint ¶ 14.

The Complaint concedes that Brzonkala did not preserve any physical evidence from this alleged rape and "did not bring criminal charges against Morrison or Crawford." Complaint ¶ 33; App. 191a (Niemeyer, J., concurring). Nonetheless, Brzonkala "approved and . . . participat[ed] in a [subsequent] criminal investigation about events which occurred on September 21-22, 1994 by the Virginia State Police." Complaint ¶ 4. The record does not disclose the outcome of that investigation.

This action was commenced on or around December 27, 1995 with the filing of the original complaint. Both the original complaint and the amended complaint sought a remedy pursuant to 42 U.S.C. § 13981, which is the main part of Subtitle C of Title IV of Public Law 103-322 (hereinafter, "Subtitle C" or "Section 13981"). This law was passed on September 13, 1994, just a few days before the purported rapes alleged in the Complaint.

B. Statutory Background

Subtitle C provides a tort remedy for a "crime of violence motivated by gender." That key phrase is defined to mean "a crime of violence committed because of

gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender." 42 U.S.C. § 13981(d)(1) (emphasis added). There are, then, two requirements that a plaintiff must state and prove, each of which should be given independent meaning: (1) the crime of violence must be perpetrated because of gender and (2) the act must be perpetrated with a gender-based animus. Gustafson v. Alloyd Co., 513 U.S. 561, 574 (1995) (Court should "avoid a reading which renders some words altogether redundant.").

Although Congress left it to the courts to determine the meaning of these requirements, it made clear that it did not believe that all rapes or violent attacks against women would be covered. See S. Rep. 103-138 at 51 (1993) (the civil remedy "does not create a general Federal law for all assaults or rapes against women"). So, too, the legislative history makes clear that Subtitle C was not designed to cover most cases of domestic violence. S. Rep. 102-197, at 69 (1991) (the civil remedy "does not cover everyday domestic violence cases . . . This is stated clearly in the committee report and it is the only fair reading of the statutory language") (Statement by bill sponsor, Sen. Joseph Biden).

Although ostensibly motivated by "systemic" bias in state courts, Subtitle C gives state courts concurrent jurisdiction. 42 U.S.C. § 13981(e)(3). Moreover, if a claim is brought in state court, neither party can remove. 28 U.S.C. § 1445(d); Pub. L. 103-322, § 40302(e)(5). See Brzonk. Pet. 7 n.8. No prior criminal "complaint, prosecution, or conviction" is required for an action to be brought. 42 U.S.C. § 13981(e)(2). Prevailing plaintiffs in claims brought under Section 13981 are entitled to recover their reasonable attorneys' fees. See 42 U.S.C.

§ 1988(b); Pub. L. 103-322, § 40303.

The four-year statute of limitations set forth in 28 U.S.C. § 1658 would apply to any claim under Section 13981. This is much longer than the limitations periods for intentional torts in Virginia and most other states. Va. Code Ann. § 8.01-243 (Michie's 1996) (two years).

C. Proceedings In The Courts Below

The original complaint was filed on or about December 27, 1995. After both Virginia Tech and Morrison moved to dismiss, the parties agreed that plaintiff would file an amended complaint and that defendants would respond expeditiously thereto.

The amended complaint added two new parties, Cornell Brown and William Landsidle and a variety of new claims. (Claims against both of these parties were eventually dismissed, the claims against Brown based in part on plaintiff's own motion for voluntary dismissal.) Plaintiff asserted claims against Morrison and Crawford under Subtitle C and under state tort law. Shortly thereafter, defendants Morrison and Crawford moved to dismiss the Complaint on the grounds that the Complaint failed to state a claim under Subtitle C, that Subtitle C could not be constitutionally applied to them, and that the court had no jurisdiction over the state tort claims. The United States intervened to defend the constitutionality of Subtitle C.

1. The District Court's Decision. -- The District Court dismissed plaintiff's claims under Section 13981 in an order and judgment dated July 26, 1996. The pendent state claims were dismissed without prejudice. App. 402a-03a.

The District Court first addressed respondents' contention that the Complaint did not adequately allege "gender animus." The court rejected that argument, citing the allegations in the Complaint that (1) Morrison and Crawford allegedly engaged in "gang rape"; (2) the rapes were closer to "stranger rape" than "date rape" which made them less likely, according to the Court, to involve a misunderstanding, personal animus, or overheated sexual passion; and (3) some months after the alleged incident, Morrison was allegedly overheard saying that he liked to "get girls drunk and f**k the s**t out of them." App. 359a-60a. The court did not decide whether a claim had been alleged against Crawford. App. 361a-62a.

The District Court then analyzed the constitutionality of Subtitle C, considering first whether Section 13981 could be justified as legislation designed to "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const., art. I, § 8. The court carefully applied this Court's reasoning in United States v. Lopez, 514 U.S. 549 (1995), holding that Congress exceeded its authority under the Commerce Clause in passing 18 U.S.C. § 922(q), the Gun-Free School Zones Act ("GFSZA"). Considering the three permissible categories of regulation that the Supreme Court had identified in Lopez (viz., regulating the channels of interstate commerce, regulating the instrumentalities of interstate commerce, and regulating activity that substantially affects interstate commerce), the District Court concluded, just as in Lopez, that the first two categories were inapplicable. App. 363a-64a.

The District Court then considered four factors from this Court's opinion in Lopez to determine whether Subtitle C was a proper exercise of Congress's authority

under the third category: (1) whether the regulated activity is economic in nature, (2) the presence of a jurisdictional requirement in the law itself, (3) the importance of legislative history, and (4) the practical implications of accepting an argument that the regulated activity "substantially affects" interstate commerce. App. 365a-69a.

The District Court compared the similarities and differences between Subtitle C and the GFSZA and concluded that the similarities (like the non-economic nature of the activity being regulated, the absence of any jurisdictional requirement, and the practical implications of recognizing the effects on commerce of the regulated activity as "substantial") outweighed the differences. It considered three possible differences: (1) that Congress made more extensive findings with respect to Subtitle C than it had with the GFSZA; (2) that Subtitle C provides for civil liability rather than criminal; and (3) that "fewer steps of causation" are involved in going from the regulated activity to an effect on interstate commerce. App. 371a-76a.

With respect to congressional findings underlying Subtitle C, the District Court found that the Lopez Court specifically had denied any necessity for Congress to make findings. In addition, it recognized that Congress had amended the GFSZA to add such findings (and that such findings were before the Court when Lopez was argued and decided),[1] and that the Court specifically considered

[1] In Section 320904 of Public Law 103-322, Congress amended the GFSZA to set forth findings that crime is a nationwide problem which is exacerbated by the interstate movement of drugs, guns, and criminal gangs; firearms and their component parts move easily in interstate commerce and guns have been found in increasing numbers around schools; citizens fear to travel through certain parts of the country due

(continued...)

the effects on interstate commerce that had been proffered by the Solicitor General. Accordingly, the District Court concluded that the existence of legislative findings for Subtitle C did not distinguish Lopez. App. 371a-73a.

With respect to the civil nature of Section 13981, the District Court simply noted that the Act defines the conduct that it regulates in terms of criminal law (see 42 U.S.C. § 13981(d)(2)(A)) and that, in any event, this Court has never analyzed criminal and civil laws passed pursuant to Congress's Commerce Clause authority any differently. App. 373a-74a.

With respect to the steps of causation, the District Court found any difference unimportant because gun-ownership is sufficiently close to acts of violence -- indeed, the entire body of federal gun control law is based on the assumption that one leads to the other -- and because the alleged effects touted by the government for both laws, such as the unwillingness of people to travel, did not require actual violence, but only the threat of violence. App. 374a-76a.

Because any differences between the two statutes were outweighed by the similarities, the District Court concluded that Congress had no authority to pass Subtitle C as a regulation of interstate commerce. App. 376a-82a.

[1](...continued)
to concern about violent crime and gun violence; the occurrence of violent crime in school zones has resulted in a decline in the quality of education, which in turn has had an adverse impact on interstate commerce; and States are unable to handle gun-related crime on their own. 18 U.S.C.A. § 922(q)(1) (West Supp. 1996).

In analyzing whether Congress had the authority under Section 5 of the Fourteenth Amendment to reach the private conduct regulated by Section 13981, the District Court began by noting that the Civil Rights Cases, 109 U.S. 3 (1883) precluded any finding that Congress had such authority. App. 385a. Nonetheless, the District Court engaged in an extensive analysis to determine whether Subtitle C could survive a means/ends analysis, presaging to a significant degree this Court's subsequent decision in City of Boerne v. Flores, 521 U.S. 507 (1997). It concluded that remedying private discriminatory acts unrelated in the specific instance to any state rule of conduct or otherwise chargeable to the state was not a legitimate end under the Fourteenth Amendment. App. 391a-98a. The court then concluded that remedying state bias against women was a legitimate end under the Fourteenth Amendment, but that Subtitle C was not "plainly adapted" to that end. App. 399a-401a.

Having concluded that neither the Commerce Clause nor Section 5 of the Fourteenth Amendment of the United States Constitution granted Congress authority to reach the non-economic, private conduct covered by Subtitle C, the court granted the Rule 12(b)(6) motion of Morrison and Crawford. The court declined to exercise supplemental jurisdiction over plaintiff's state law claims.

Shortly after the dismissal of the action in the District Court, plaintiff commenced an action in the Circuit Court of the City of Chesapeake against Morrison and Crawford for common law assault and battery. City of Chesapeake Circuit Court At-Law No. CL96-814. The "motion for judgment" (Virginia's version of a complaint) in that case noted the dismissal of the federal action and stated that "[p]laintiff will not appeal the federal court's

dismissal of her common-law claims, but rather brings those common-law claims under the exclusive jurisdiction of this honorable Court." Plaintiff later non-suited that action, it was dismissed on August 26, 1997, and she has not refiled it.[2]

2. Proceedings In The Fourth Circuit. -- On December 23, 1997, a divided panel of the Fourth Circuit reversed the decision of the District Court. It held that Subtitle C was a legitimate exercise of Congress's Commerce Clause power; accordingly, the majority did not determine whether Section 5 of the Fourteenth Amendment could sustain Subtitle C. App. 282a. On February 2, 1998, the full court vacated the opinion of that panel and ordered the case reheard en banc in March 1998. App. 13a. One year later, the full court affirmed the judgment of the District Court.

Throughout the appellate process -- even after the full Court of Appeals vacated the panel decision and made obvious its concern about the constitutionality of the statute -- neither Brzonkala nor the United States filed any petition for a writ of certiorari with this Court. See 28 U.S.C. § 1254(1) (writ may be granted "before or after rendition of judgment or decree"); Heckler v. Edwards, 465 U.S. 870, 884 (1984) (same). See also 28 U.S.C. § 2101(e) (petition can be made at any time before final

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[2] Although these proceedings are not in the record (App. 191a (Niemeyer, J., concurring)), this Court may take judicial notice of official proceedings in another court. E.g., Burbank-Glendale-Pasadena Airport Authority v. City of Burbank, 136 F.3d 1360, 1364 (9th Cir. 1998); Opoka v. Immigration and Naturalization Service, 94 F.3d 392, 394 (7th Cir. 1996) (court "has the power [and] . . . the obligation to take judicial notice of the relevant decisions of courts . . . , whether made before or after the decision under review").

judgment).

The en banc court first concluded that the allegations of the Complaint did state a claim against Morrison, relying almost entirely on Morrison's alleged overheard, offensive statement (at some undefined time in the five months after the alleged sexual assault). App. 14a. The Fourth Circuit did note that the allegations did not "necessarily compel the conclusion that Morrison acted from animus toward women as a class" and "might not even be sufficient, without more, to defeat a motion either for summary judgment or for a directed verdict." Id. It also held that it was "much less clear" whether Brzonkala had stated a claim against Crawford. Id. n.3.[3]

Reaching the constitutional issue, the court first concluded that Subtitle C could not be sustained as an exercise of Congress's Commerce Clause authority. It noted that the phrase "substantially affects interstate commerce" was a term of "legal art" (App. 17a) that required an examination of the factors considered important in Lopez. It cited numerous quotes from Lopez all support-

[3] Because Morrison and Crawford obtained a judgment in the lower court entirely in their favor, they cannot file a cross-petition. Northwest Airlines, Inc. v. County of Kent, 510 U.S. 355, 365 n.8 (1994). However, they are free to raise any argument properly raised that would support the judgment of the court below, and this Court may affirm on any such ground. County of Kent, 510 U.S. at 364; Thigpen v. Roberts, 468 U.S. 27, 30 (1984) (affirming on ground not relied upon by the court below and not addressed in the petition for certiorari). Since a reasonable statutory construction could avoid constitutional questions, Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council, 485 U.S. 568, 575 (1988), Morrison and Crawford may raise the statutory issue should this Court grant the petition.

ing the proposition that this Court, in concluding that Congress exceeded its powers, placed great emphasis on the non-economic nature of the activity being regulated by the GFSZA. The Fourth Circuit concluded that the non-economic nature of the activity being regulated was an important, if not dispositive, factor in defining the outer limits of the phrase "substantially affects interstate commerce." App. 18a-20a & 20a-22a n.5 (numerous different cites from Lopez majority opinion, concurrences, and dissents).

The court concluded that Subtitle C regulated, and was intended to regulate, non-economic activity, and was not part of a larger regulatory scheme of economic activity. App. 24a-27a. See also U.S. Pet. 3 ("Congress enacted VAWA in 1994 to address 'the escalating problem of violence against women'"). Since, in addition, Subtitle C had no jurisdictional element, the court concluded that it could not be sustained under Congress's authority to regulate "commerce among the several states." App. 31a.

Nonetheless, the en banc court went on to assess other aspects of Subtitle C, under the assumption that the regulation of non-economic activity rendered the statute only presumptively unconstitutional. App. 31a-32a. It noted the arguments identifying the "effects" gender-based, animus-motivated violence has on interstate commerce "closely resemble, and are functionally equivalent to, the arguments advanced by the government in Lopez" (App. 35a), and would "effectively . . . remove all limits on federal authority, and . . . render unto Congress a police power impermissible under our Constitution" (App. 40a). See also App. 90a-91a & 91a-92a n.23 (taking quote from dissent and showing that, by removing the words "gender-based," it equally supports the regulation of

all violent crime). Thus, the court concluded that the other factors identified in Lopez also militated in favor of its conclusions.

The Court of Appeals then proceeded to consider carefully each of the arguments that the government and Brzonkala had proffered to distinguish Lopez. It first rejected petitioners' argument that this Court relied on the absence of Congressional findings in Lopez and/or that it concluded that it would have to "pile inference upon inference" (Lopez, 514 U.S. at 567) to conclude that possession of guns substantially affected interstate commerce solely because of an absence of Congressional findings. App. 52a-64a. The Fourth Circuit concluded that the argument more nearly described the decision of the Fifth Circuit in Lopez, which had relied entirely on the absence of findings, rather than the opinion of this Court. App. 60a-61a. It recognized that this Court specifically had held that legislative findings were not necessary and opined that "one would have to ignore everything the [Supreme] Court said in that opinion, other than its single, passing allusion to the statute's lack of findings" to conclude that the constitutional flaw in the GFSZA could be remedied by such findings. App. 62a. The Fourth Circuit also noted that this Court had findings before it, and that Lopez thus would have been an "unusual case" to announce a rule that Congress must engage in procedural formalities similar to the rules imposed upon administrative agencies. App. 63a. See also id. (under government's view, Lopez "would have constituted little more than historical irrelevancy").

The court below nonetheless evaluated the Congressional findings, and concluded that most of them did not show the effect of gender-based, animus-motivated violent

felonies on interstate commerce, but rather the effects of all violence against women and/or all domestic violence on the economy. App. 64a-66a. See also U.S. Pet. 7, 10-11 (relying upon similar statistics). It found that the less specific findings relating to the violence being regulated by Subtitle C -- involving reduced travel to dangerous areas, and fewer transactions by victims with businesses that engage in interstate commerce -- failed to meet the "substantially effects" test outlined in Lopez. App. 66a-70a.

In addressing petitioners' remaining arguments, the en banc Court of Appeals concluded that (1) there was no special dispensation in the Constitution for laws labelled "civil rights" laws, that rubric being undefined in or outside of the Constitution, and that any such law must be passed pursuant to a specific enumerated power (App. 70a-76a), (2) cases prior to Lopez did not require it to uphold Subtitle C for the same reasons they did not require this Court to sustain the GFSZA, i.e., because the earlier decisions involved statutes which regulated "economic activity" in a way that the possession of guns around schools or violent gender-based animus-motivated felonies did not (App. 80a-83a), and (3) petitioners' arguments that Subtitle C did not offend principles of federalism misunderstood the principle of federalism that motivated this Court in Lopez, viz., the logical consequences of the arguments proffered to uphold the GFSZA as opposed to the particular intrusiveness of any specific law (App. 88a). (On this last point, the Fourth Circuit noted that the GFSZA was careful to leave intact state definitions, and did not preempt state law -- indeed, it concluded that the GFSZA was more respectful of state law than Subtitle C. Compare App. 42a n.10 with App. 44a.)

The court then turned to Section 5 of the Four-

teenth Amendment, the other proposed basis for Subtitle C. After noting the history of the Amendment -- and specifically, the failed Bingham Amendment which would have given Congress a general power to legislate with respect to many areas of traditional state responsibility -- the court concluded that Section 5 only permitted Congress to legislate directly against state action. The court found support for that conclusion in two decisions of this Court: United States v. Harris, 106 U.S. 629 (1883) and the Civil Rights Cases, 109 U.S. 3 (1883), which the Fourth Circuit analyzed in great detail. App. 104a-111a. It noted that each case involved a statute that had been passed only after extensive legislative hearings demonstrating that the States had failed to protect African Americans against private harms violative of state law. App. 120a-21a, 124a-25a. See also App. 119a-20a ("as an historical matter, it is indisputable that Congress enacted those civil rights laws for the precise purpose of remedying massive and systemic violations of equal protection by the States").

The Court of Appeals also rejected the petitioners' argument that Harris and the Civil Rights Cases had been "tacitly" overruled by later cases. App. 126a-41a. The Fourth Circuit noted that this Court had just recently reaffirmed the Section 5 analysis of those cases in City of Boerne v. Flores, 521 U.S. 507, 524-25 (1997). App. 104a, 141a-42a.

Despite the fact that it deemed the matter controlled by binding precedent, the Fourth Circuit also applied City of Boerne and engaged in a "means/ends" analysis to determine if Subtitle C was appropriate legislation for enforcing Section 1 violations. It concluded that much of the legislative history did not demonstrate the kind of purposeful discrimination by state actors required by the

Equal Protection Clause. App. 151a-60a. See Personnel Administrator of Massachusetts v. Feeny, 442 U.S. 256, 279 (1979) ("'Discriminatory purpose,' however, implies more than intent as volition or intent as awareness of consequences . . . It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."). Rather, its review of all of Title IV and its structure and legislative history demonstrated that Subtitle C was designed to send a "signal" that might overcome subtle societal prejudices. App. 160a.

The Fourth Circuit also concluded that there was no "congruence and proportionality" between Section 13981 and any violation of the Equal Protection Clause. It relied specifically upon the facts that the statute does nothing to remedy or correct any discriminatory enforcement by the States and that the existence or non-existence of a cause of action under Section 13981 in any specific case has nothing to do with any finding of an Equal Protection violation. App. 160a-63a.

Finally, the Fourth Circuit concluded that petitioners' bold theory of Section 5 would allow the federal government to regulate directly in any area (like criminal law and domestic relations) in which there is any evidence that state procedures or institutions have any gender or racial bias. It noted that the same studies relied upon in passing Subtitle C also found bias in many other areas of law, and would (under petitioners' theory) permit Congressional takeover of such areas. App. 164a-66a. See also App. 74a-76a, 89a. So, too, a finding of State "failure" to enforce robbery or burglary laws protecting property rights against private invasion would permit Congress

to regulate those areas as well, as a means of enforcing the Section 1 provision precluding State deprivations of property without due process. App. 165a. The Fourth Circuit concluded that it could not give its imprimatur to such expansive theories of Congressional authority under Section 5. App. 166a.

REASONS FOR DENYING THE WRIT

The separate petitions for the United States and Brzonkala rely significantly on the fact that the Fourth Circuit declared a statute of Congress unconstitutional.[4] To be sure, that is generally deemed a factor in this Court's consideration of a petition for a writ of certiorari.

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[4] Contrary to Brzonkala's claim that the court below "invalidated the entirety of the civil remedy . . . on its face" (Brzonk. Pet. 17 n.4), the decision below did not address the constitutionality of Subtitle C in contexts other than those raised by the allegations of the Complaint. Subtitle C also applies to (1) those who act under color of state authority (42 U.S.C. § 13981(c)) and (2) violent acts in any "special maritime, territorial, or prison jurisdiction of the United States" (42 U.S.C. § 13981(d)(2)(A)).

Brzonkala asserts that the statute in question can be sustained here "as applied" because the Complaint alleges that she terminated her college education nearly a year after the alleged rape, and thus did not pay her college tuition and other fees. Brzonk. Pet. 17 n.14. Brzonkala cannot claim that any interstate commercial transaction was affected by this purported consequence because she resides in Fairfax, Virginia. Complaint ¶ 7. The tenuous connection she cites between the alleged attack and the failure of an intrastate commercial transaction nearly one year later is far weaker than the connection between the possession of a gun at issue in Lopez and a more immediate commercial transaction. As the en banc Fourth Circuit noted, Alfonso Lopez had brought his gun to school to sell it for $ 40 so that it could be used in a gang war. App. 25a; United States v. Lopez, 2 F.3d 1342, 1345 (5th Cir. 1993), aff'd, 514 U.S. 549 (1995).

But, it is not dispositive, and petitioners have provided no other reason at all for this Court to grant the petitions.

The United States does not pretend that there is any circuit split on any significant question. Its other reasons for seeking the writ are based on its contentions that the Fourth Circuit erred in its decision. But claims of error by the court below are usually insufficient reason to grant the writ. Moreover, the errors that the United States assigns to the Fourth Circuit are virtually identical to the arguments that the en banc Fourth Circuit considered at great length and rejected. In fact, for a petition that relies so heavily on assignment of error to the Fourth Circuit, the government's petition is remarkably bereft of any effort to respond to the Fourth Circuit's analysis and repudiation of the government's arguments.

Brzonkala goes further, and, in addition to assigning error to the decision of the court below, claims that the decision creates numerous circuit splits. However, these circuit splits are fabricated, and are created primarily by erroneously attributing propositions of law to the Fourth Circuit.

A. The Fact That The Court Of Appeals Found An Act Of Congress Unconstitutional Is Not A Sufficient Ground To Grant The Petitions

Prior to 1988, part of this Court's "mandatory" appellate jurisdiction was set forth in 28 U.S.C. § 1252, which gave this Court appellate jurisdiction over any civil case in which the United States was a party and a federal court declared a federal law unconstitutional. Heckler v. Edwards, 465 U.S. 870, 878 (1984). Section 1257(1) of the Judicial Code provided for similar appellate jurisdic-

tion whenever the highest state court in which a decision could be had decided against the validity of an act of Congress. 28 U.S.C. § 1257(1) (repealed). Key v. Doyle, 434 U.S. 59, 61 n.3 (1977).

In 1988, Congress -- with the support of the members of this Court[5] -- passed Public Law 100-352, known as the Supreme Court Case Selection Act of 1988. That statute repealed 28 U.S.C. § 1252, and rewrote Section 1257 so that such cases can be reviewed only by writ of certiorari. The plain effect of these amendments was to give this Court the discretion to reject cases in which a federal or state court declared an act of Congress invalid, even when the United States was a party (just as this Court had such discretion prior to those amendments when the United States was not a party to a federal civil case).

Both before and after the amendments, this Court has denied review when Courts of Appeals have declared statutes unconstitutional. See, e.g., Valley Broadcasting Co. v. United States, 107 F.3d 1328, 1336 (9th Cir. 1997) (holding that 18 U.S.C. § 1304 violates the First Amendment), cert. denied, 118 S. Ct. 1050 (1998); ACORN v. Edwards, 81 F.3d 1387 (5th Cir. 1996) (striking down 42 U.S.C. § 300j-24(d), a provision of the Lead Contamination Control Act of 1988 as unconstitutional), cert. denied, 521 U.S. 1129 (1997); Wilson v. NLRB, 920 F.2d 1282 (6th Cir. 1990) (declaring religious objector provision of

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[5] See S. Rep. 95-985 (1978) Appendix I (letter from all nine Justices supporting repeal of mandatory jurisdiction); Remarks Of Justice William Brennan at the Third Circuit Judicial Conference, September 9, 1982 (hereinafter, "Brennan Remarks"), p. 4 ("every member of the Court devoutly hopes [bill to end mandatory jurisdiction] will be adopted").

the National Labor Relations Act, 29 U.S.C. § 169, unconstitutional under the Establishment Clause), cert. denied, 505 U.S. 1218 (1992); Rayburn v. General Conference Of Seventh-Day Adventists, 772 F.2d 1164 (4th Cir. 1985) (declaring Title VII provisions against race and sex discrimination unconstitutional as applied to church), cert. denied, 478 U.S. 1020 (1986).

There is no hierarchy of federal laws, such that this Court should grant a petition for writ of certiorari whenever a state or lower federal court invalidates an "important" act of Congress, but permitting denial of the petition when a state or lower federal court invalidates an "unimportant" act of Congress. When a federal statute is declared unconstitutional, this Court has historically required the presence of other factors militating in favor of exercising its certiorari jurisdiction before granting a petition. Here, there is none.

B. The Accusations Of Error Ignore Or Distort The Opinion Of The Fourth Circuit *En Banc*

The additional factor cited by the United States is that the Fourth Circuit "adopt[ed] an unduly restrictive view of the reach of Congress's powers under both the Commerce Clause and the Fourteenth Amendment." U.S. Pet. 19. In other words, the government believes that the Fourth Circuit was wrong on the underlying substantive issues. But this Court does not generally exercise its discretionary jurisdiction simply to correct errors in the decisions of the lower courts. See Robert L. Stern, Eugene Gressman, Stephen M. Shapiro, and Kenneth S. Geller, Supreme Court Practice, § 4.17 at 193 (7th ed. 1993) (hereinafter "Stern, et al., Supreme Court Practice") ("It has been reiterated many times that the Supreme Court

is not primarily concerned with the correction of errors in lower court decisions"); Brennan Remarks, p. 3 ("ever since the Judges Bill of 1925 the Supreme Court . . . has not been expected to take on the function of primarily -- or even largely -- correcting errors committed by other courts").

Moreover, the "errors" assigned by the petitioners are easily refuted just by reviewing the decision of the Fourth Circuit.

1. Both petitioners contend that the Fourth Circuit erred because Lopez did not preclude Congress from regulating non-economic activity unrelated to any comprehensive scheme of commercial regulation. U.S. Pet. 19; Brzonk. Pet. 19. But neither petitioner explains why this Court repeatedly referred to the non-economic nature of the activity being regulated in Lopez, and neither cogently explains how the non-economic nature of the activity should be considered in any analysis under the Commerce Clause. The Fourth Circuit, after all, analyzed Subtitle C under two alternative assumptions: first, that the non-economic nature of the activity and the absence of a jurisdictional requirement were dispositive and, second, that those factors were merely "presumptive" of a law outside of Congress's Commerce Clause authority. Petitioners apparently believe that both theories are wrong; but they offer no explanation for this Court's repeated referrals to the non-economic nature of the activity in its decision in Lopez.[6]

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[6] The United States states only that this Court "observed" that the statute neither regulated an economic activity nor contained a jurisdictional element. U.S. Pet. 20. In an effort to show that this "observa-

(continued...)

To the extent an alternative theory can be gleaned from the petitions, the United States seems to argue that, if the activity being regulated is non-economic, it merely imposes a requirement of Congressional findings that would not exist otherwise. U.S. Pet. 21. Nothing in Lopez itself so holds. Its brief one paragraph reference to the absence of Congressional findings in that case does little more than reject the Fifth Circuit holding that findings were necessary and state that they might have been helpful. Lopez, 514 U.S. at 562-63. Neither petitioner bothers to respond to the Fourth Circuit's rejection of their "formalism" argument. The Court of Appeals noted that (1) if findings were dispositive, it was rather odd for this Court not to mention that fact since there were in fact findings concerning the GFSZA before this Court in Lopez (App. 63a), (2) if findings were dispositive, this Court's analysis of the government's and dissents' theories of how gun possession affected interstate commerce was superfluous (App. 55a-56a, 61a), (3) both the Attorney General and Congress concluded that the findings related to the GFSZA were insufficient to render it constitutional (App. 63a-64a), and (4) an interpretation that Lopez only im-

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[6](...continued)
tion" was unimportant, the United States then quotes from a part of the Lopez decision in which this Court was simply reviewing its previous precedents (and, in the specific instance, quoting Wickard v. Filburn, 317 U.S. 111, 125 (1942)). U.S. Pet. 20. (The United States ignores the Lopez Court's distinction of Wickard. Lopez, 514 U.S. at 560.) It was no doubt this kind of sophistry that led the en banc court to state that petitioners "come dangerously close to affirmatively misrepresenting the holding and analysis of *Lopez*" in the Fourth Circuit. App. 82a n.20. See also App. 123a (referring to petitioners' "breathtaking ahistoricism"); App. 77a ("we find such a superficial understanding of Lopez, especially by the United States, surprising").

posed a procedural or formal requirement for Congress would be inconsistent with the well-articulated concern of the Lopez Court that Congress not be granted a general police power (App. 61a-62a). See also Seminole Tribe v. Florida, 517 U.S. 44, 64 (1996) ("'If Hans [v. Louisiana, 134 U.S. 1 (1890)] means only that federal-question suits for money damages against the States cannot be brought in federal court unless Congress clearly says so, it means nothing at all'" quoting Pennsylvania v. Union Gas Co., 491 U.S. 1, 36 (1989) (Scalia, J. dissenting), overruled, Seminole Tribe v. Florida, 517 U.S. 44 (1996)).

2. Petitioners claim that the Fourth Circuit erred in concluding that Subtitle C presented any federalism concerns. U.S. Pet. 23-25; Brzonk. Pet. 22-23. The government (unlike Brzonkala) briefly mentions this Court's real concern about federalism in Lopez. U.S. Pet. 21 ("The Court observed that it had been offered no rationale to uphold the [GFSZA] that was not capable of infinite expansion"). But the government offers no explanation as to why that same concern is not equally applicable to Subtitle C. Nor does it make any effort to refute the conclusions of the lower courts that the petitioners' theories of Commerce Clause authority would be sufficient to regulate any and all crime, insomnia, exercise regimens, and many other aspects of human existence that can be said to significantly affect our aggregate ability to consume and produce in interstate commerce. App. 38a.

Instead, the United States and Brzonkala attribute error to the Fourth Circuit by focusing on a series of other federalism concerns. For example, the United States relies upon one footnote in Lopez (quoting the signing statement of President Bush, who apparently objected to the bill he was signing into law) stating that the GFSZA

"overrode" State laws, and argues that Subtitle C is more deferential to state law. U.S. Pet. 23-24; see also id. 24-25 & n.11. The United States cannot (and does not bother to) refute the Fourth Circuit's careful analysis that the GFSZA was just as respectful, indeed, more respectful, of state law than Subtitle C. App. 41a-42a, n.10.

The United States also relies on the Congressional finding that States were doing an inadequate job of dealing with gender-based, animus-motivated crime in passing Subtitle C. U.S. Pet. 24. It cites no authority for the proposition that the Commerce Clause power expands and contracts depending upon how Congress has analyzed the States' performance in a particular area. Such a proposition would be inconsistent with the repeated holdings of this Court that Congress's Commerce Clause power is plenary. Southland Corp. v. Keating, 465 U.S. 1, 11 (1984) ("At least since 1824 Congress' authority under the Commerce Clause has been held plenary"); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276 (1981) ("This power is 'complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution" quoting Gibbons v. Ogden, 22 U.S. 1 (1824)). Moreover, the argument has the same defects just noted with the "legislative-findings-are-dispositive" argument since a finding that the States were incapable of preventing the possession of guns around schools was before the Court in Lopez. See n.1, supra.

Brzonkala repeatedly assails the Fourth Circuit for its overly broad interpretation of a "traditional state concern." E.g., Brzonk. Pet. 16-17, 21, 22-23. She also suggests that Congressional authority is more expansive when it is legislating with respect to "civil rights" or in

removing discriminatory barriers to participation in the economy. Brzonk. Pet. 22-23. She, too, can cite no authority (because none exists) to suggest that the Commerce Clause power waxes and wanes depending upon whether Congress is legislating in the civil rights area or in an area of traditional state concern. Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) ("As long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States. Congress may legislate in areas traditionally regulated by the States."). (The civil rights statutes at issue in cases like Katzenbach v. McClung, 379 U.S. 294 (1964) regulated commercial establishments (restaurants and hotels) with a far closer relationship to interstate travel than violence in general, much less gender-based, animus-motivated violence.) Certainly, nothing in the Fourth Circuit opinion suggests that "commerce among the states" is an elastic grant of authority that grows when exercised in special areas.[7]

3. With respect to Section 5, the United States claims that the Fourth Circuit erred in relying upon United States v. Harris, 106 U.S. 629 (1883) and the Civil Rights Cases, 109 U.S. 3 (1883). It makes the same distinctions of those cases that it made before the Fourth Circuit, viz., that the statutes involved in those cases (the Civil Rights Acts of 1871 and 1875) attempted to impose Constitutional norms of non-discrimination upon private parties (U.S. Pet. 27), and were "premised on the assumption that private conduct can violate the Fourteenth Amendment" (U.S. Pet. 28). As in the lower courts, the United States

[7] Indeed, Brzonkala's arguments here conflict with her primary argument that the Fourth Circuit erred in adopting a "per se rule against regulating non-economic activity." Brzonk. Pet. 15. If it is a per se rule, other factors are irrelevant.

cannot find anything in those cases which actually states anything like that, and, indeed, its own citations to the Civil Rights Cases demonstrates that this Court's concern was the failure of the Civil Rights Act of 1875 to address and remedy state violations of the Equal Protection Clause. U.S. Pet. 27 (quoting the Civil Rights Cases). The United States also ignores the long history cited by the Fourth Circuit, App. 118a-25a, which demonstrates that those laws were, in fact, efforts to remedy perceived defects in state enforcement of state law.

4. Both Brzonkala and the United States assert ipse dixit that the Fourth Circuit erred because Congress passed Subtitle C to remedy Equal Protection violations. E.g., U.S. Pet. 26; Brzonk. Pet. 28. They do not address the legislative history and other factors cited by the Fourth Circuit refuting that contention. App. 155a-60a.

5. Finally, the United States claims that the Fourth Circuit erred in not finding Section 13981 appropriately remedial. It argues that Subtitle C is remedial because it affords victims of gender-based, animus-motivated violent felonies an opportunity to sue in federal court and obtain redress not controlled by the State. U.S. Pet. 29. It does not explain why Subtitle C gives concurrent jurisdiction to state courts, and it does not explain how this remedy does anything at all to correct the purported biases in State criminal courts that were the purported impetus for the civil remedy.[8] The United States

[8] The United States also quotes a 1990 Senate Report to the effect that the remedy is proper because federal judges have "the power to screen out jurors who harbor irrational prejudices against, for example, rape victims." U.S. Pet. 29. The government does not say why state

(continued...)

further extols the remedy because it is "entirely unintrusive, . . . displaces no state law and prohibits no state action." Id. These are rather odd virtues for a law purportedly designed to remedy pervasive and intentional state discrimination.

C. Brzonkala's "Circuit Splits" Are Fabricated

The United States concedes that there is no circuit split on Subtitle C's constitutionality. U.S. Pet. 18. It does rely upon the facts that the decision of the en banc court was "sharply divided" and that most district courts have upheld the statute. Id. But these are not traditional factors considered by this Court in exercising its discretionary jurisdiction. E.g., Stern, et al., Supreme Court Practice, § 4.8 at 178 ("The Supreme Court will not grant certiorari to review a decision of a federal court of appeals merely because it is in direct conflict on a point of federal law with a decision rendered by a district court").

Unlike the United States, Brzonkala claims four or more "circuit splits." She creates these so-called splits by misreading the opinion of the Fourth Circuit and/or the opinions of other courts.

With respect to the Commerce Clause, Brzonkala first claims that the Fourth Circuit's "per se rule" that Congress cannot regulate non-economic activity with no interstate nexus under the "substantially affecting" branch of Commerce Clause authority is inconsistent with seven

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[8](...continued)
judges lack this power, or, why Subtitle C would give those judges concurrent jurisdiction if they did lack it.

other circuits' interpretation of Lopez (which purportedly hold that Congress can regulate non-economic conduct). Brzonk. Pet. 13. Of course, Brzonkala neglects to mention the Fourth Circuit found that rule unnecessary to the decision before it. That is, it concluded that Subtitle C is unconstitutional "[e]ven if . . . Congress may regulate non-economic activities absent jurisdictional elements in at least some circumstances." App. 31a-32a.

Moreover, when one examines the decisions of the other circuits, the so-called split is even more contrived. Other circuits simply have a narrower definition of "economic" activity than the Fourth Circuit (and thus need to give Congress authority over "non-economic" activity to uphold the same laws that the Fourth Circuit upholds as regulations of "economic" activity). Compare App. 25a (citing Fourth Circuit panel decision in Hoffman v. Hunt, 126 F.3d 575, 586-87 (4th Cir. 1997), cert. denied, 118 U.S. 1838 (1998) upholding the Freedom of Access to Clinic Entrances Act of 1994 ("FACE") because it regulated conduct "'closely and directly connected with an economic activity' -- the operation of abortion clinics") with United States v. Bird, 124 F.3d 667, 675 (5th Cir. 1997) (cited at Brzonk. Pet. 15) (although FACE regulated non-economic activity, it was valid because it was "'an essential part of a larger regulation of economic activity in which the regulatory scheme could be undercut unless the intrastate activity were regulated,'"), cert. denied, 118 U.S. 1189 (1998). See also Brzonk. Pet. 15 n.13.

Indeed, regardless of whether they characterize activity like that regulated in FACE -- closely connected to a specific economic transaction or business -- as "economic" or "non-economic," the circuit courts have consistently required at least that close connection. E.g., United States

v. Olin Corp., 107 F.3d 1506, 1511 (11th Cir. 1997) (cited at Brzonk. Pet. 15) (Congress could regulate pollution of a chemical manufacturer because its "actions have an economic character"); United States v. Serang, 156 F.3d 910, 913 (9th Cir.) ("In Lopez, the Supreme Court held that, to be regulated, intrastate economic or commercial activities must substantially affect interstate commerce in the aggregate, while non-economic or non-commercial activities must individually have a substantial effect on interstate commerce"), cert. denied, 119 S. Ct. 627 (1998).[9]

Brzonkala also claims that the Fourth Circuit adopted a "per se rule that intrastate conduct that has an 'indirect' effect on interstate commerce cannot substantially

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[9] Brzonkala takes two other tacks in her efforts to manufacture circuit splits. First, she relies upon Child Support Recovery Act cases without apprising the Court that that statute (as the cases she identifies recognize) has a specific interstate requirement. Brzonk. Pet. 16. Second, she cites non-majority opinions in contravention of standard citation rules requiring them to be identified as such. Thus, she cites Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041 (D.C. Cir. 1997), cert. denied, 118 S. Ct. 2340 (1998) in the text on page 14 of her petition, and only in a footnote -- where she relies upon Judge Wald's own opinion of how similar her views are to those of Judge Henderson -- is it even hinted that the opinion upon which she relies was joined by only one judge. In fact, Judge Henderson's concurrence focused on the regulation's close commercial links, see Babbitt, 130 F.3d at 1058 (Henderson, J. concurring) (the challenged regulation "regulates and substantially affects commercial development activity which is plainly interstate"). See generally The Bluebook, A Uniform System of Citation 65 (16th ed. 1996) (Rule 10.6) (parenthetical information should indicate whenever a citation "is not the single, clear holding of a majority of the court"). See also Brzonk. Pet. 17 (citing an opinion in United States v. Kirk, 105 F.3d 997 (5th Cir.), cert. denied, 118 S. Ct. 47 (1997) without mentioning that only four members of an en banc court subscribed to it).

affect interstate commerce." Brzonk. Pet. 16. See also Brzonk. Pet. 20 ("The court of appeals revived the formalistic distinction between direct and indirect effects as a rationale for refusing to defer to Congress' findings"). She cites four different pages from the Fourth Circuit opinion which purport to support that assertion, but none of them do. The Fourth Circuit never held that there was any "bright line" between direct and indirect effects.

Brzonkala also claims that the Fourth Circuit gave an overly broad definition to "'areas of traditional state concern' upon which the exercise of the federal commerce power may not intrude." Brzonk. Pet. 16. Id. at 17 ("overly broad characterization of exclusive state concerns" (emphasis added)). She claims that such an interpretation "directly contradicts rulings of other courts of appeals that have rejected treating the entire fields of tort and criminal law as areas of exclusive or traditional state concern." Id. But the Fourth Circuit never held that there are "exclusive state concerns" upon which the federal government cannot intrude -- nor do the cases she cites -- and Brzonkala cites nothing in the record to suggest otherwise. Brzonk. Pet. 17. See generally Gregory v. Ashcroft, 501 U.S. at 460. Indeed, while the court below did note that petitioners' expansive interpretation of Commerce Clause authority would allow Congress to intrude upon traditional state concerns, it specifically disavowed any need to rely upon such arguments. App. 73a-74a n.17 ("In reliance upon inapposite precedent, however, [petitioners] maintain that crime motivated by animus uniquely implicates federal interests and falls outside traditional areas of state concern. Even were this precedent relevant to the scope of congressional authority under the Commerce Clause . . . " (emphasis added)).

Finally, with respect to Section 5, Brzonkala claims that the decision of the Fourth Circuit is "in tension with" the rulings of other circuit courts "which squarely uphold Congress' authority to regulate conduct that itself is not unconstitutional." Brzonk. Pet. 27 n.18. But the Fourth Circuit (just like the courts in the cases Brzonkala cites, all of which involved state entities) did recognize that Congress could regulate state activities that do not violate Section 1. App. 128a. Like her "conflicts," the "tension" Brzonkala cites is fabricated.

CONCLUSION

This Court should deny the petition.

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Nos. 99-29 & 99-5

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IN THE
SUPREME COURT OF THE UNITED STATES

CHRISTY BRZONKALA,
Petitioner,

v.

ANTONIO J. MORRISON, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

It is surprising and disappointing that, rather than defend key elements of the decision below and acknowledge that there is material disagreement among the United States courts of appeal concerning the proper interpretation and application of *United States* v. *Lopez*, 514 U.S. 549 (1995) (conflicts that respondents' own ideological *amici* Pacific Legal Foundation recognize as supporting *certiorari*), respondents have resorted to *ad hominem* attacks on the petitioner and the United States. We feel it incumbent to respond to respondents' suggestions of impropriety so that they will not have the effect

(intended or otherwise) of misdirecting this Court's attention from the significant differences between the Fourth Circuit's interpretation of *Lopez* in *Brzonkala v. Virginia Polytechnic Inst.*, 169 F.3d 820 (4th Cir. 1999) (*en banc*), assessing the constitutionality of the Civil Rights Remedy of the Violence Against Women Act, 42 U.S.C. § 13981 (1999) (the "VAWA civil remedy"), and the approach taken by other circuits in assessing the constitutionality of other acts of Congress. We address respondents' arguments briefly below.

ARGUMENT

I. The Fourth Circuit's Invalidation Of The VAWA Civil Remedy Is A Proper Basis For Granting *Certiorari*.

Respondents do not dispute (nor could they) that it is within this Court's power to grant review. *See* Sup. Ct. R. 10(c). Rather, respondents assert (without citation) that "[w]hen a federal statute is declared unconstitutional, this Court has historically required the presence of other factors" supporting review. Opp. 19. We are aware of no authority that supports this proposition. Indeed, as explained in Christy Brzonkala's Petition for Writ of Certiorari ("Petition"), this Court long has recognized that when a federal court of appeals holds a federal statute unconstitutional, the federal court has exercised a "grave power," *United States* v. *Gainey*, 380 U.S. 63, 65 (1965), and *certiorari* to review that decision is proper. Pet. 11-12. Were additional factors required, the disagreement among the circuits about how to interpret key provisions of *Lopez* provides ample additional justification for review.

Respondents also assert that this Court has, in other cases, denied review when courts of appeal have declared statutes unconstitutional. Opp. 18. The mere fact that the

Court exercised its discretion to deny review in those cases in no way requires the Court to deny *certiorari* here. In addition, as more fully set forth in the Reply Brief of the United States, the decisions respondents cite either involved already settled legal issues, unusual factual circumstances with little practical significance or as-applied challenges, each of which contrasts sharply with the facial challenge here, Pet. 17, and the decision below, which struck down the VAWA civil remedy in its totality. *See* Reply Br. of United States.

None of the cited instances in which this Court denied *certiorari* denigrate the basic principle that the striking of a federal statute is a "grave" act, *Gainey*, 380 U.S. at 65, which justifies this Court's review. This point is further supported by the fact that the Fourth Circuit's decision rested on a Commerce Clause analysis and interpretation of *Lopez* that is the subject of disagreement and inconsistencies among the circuits, raising "an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c).[1]

II. The Circuit Splits Concerning The Proper Interpretation And Application Of *Lopez* Warrant This Court's Review.

Respondents misleadingly imply that the Petition asserts a circuit split on the constitutionality of the VAWA civil

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[1] Respondents' assertion that Brzonkala should have sought *certiorari* sometime during the appellate process, Opp. 9, is mystifying. There is no requirement that petitioners pursue *certiorari* at the earliest point possible. Moreover, until the Fourth Circuit issued its *en banc* decision, Brzonkala had no reason to seek *certiorari*, since the original panel reversed the district court's dismissal of her complaint.

remedy. Opp. 26. The Petition makes clear that there is no circuit split on this issue. Pet. 12. Rather, the Petition asserts that the decision below brings into focus conflicts among the circuits concerning the interpretation and application of an important decision of this Court, *Lopez*. Pet. 13. These conflicts constitute a customary and compelling reason for this Court to exercise its discretionary authority to review. *Id.*

Respondents contend that petitioner has "fabricated" a disagreement among the circuits by critiquing Brzonkala's analysis of the Fourth Circuit decision. Opp. 26-30. Glaringly absent is authority showing that the circuits consistently apply *Lopez*. Instead, respondents offer their own interpretation of the Fourth Circuit decision, which confirms the need for this Court's review.

First, respondents claim that the Fourth Circuit's rule that Congress cannot regulate non-economic activity absent an interstate nexus was "unnecessary" to its decision. Opp. 27. This is a misreading of the Fourth Circuit's opinion, which squarely held that, since the VAWA civil remedy "neither regulates an economic activity nor contains a jurisdictional element . . . it cannot be sustained" under the Commerce Clause. App. 23a-24a. *Accord* App. 21a-22a, 27a-29a, 31a, 39a-40a. This was the key ground on which the court determined that the VAWA civil remedy was unconstitutional and clearly constitutes a holding subject to this court's review. The Fourth Circuit's opinion thus creates a split among the circuits evinced by the post-*Lopez* opinions the Petition cites. Pet. 13-17.[2] Indeed, the states themselves have asked for this

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[2] In a lengthy but flatly incorrect footnote, respondents charge that Brzonkala disingenuously cites *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), *cert.*

Court's resolution of these conflicts to "provide guidance for Congress and the States in their future efforts to resolve national problems cooperatively." Brief *Amici Curiae* of 33 Attorneys General in Support of Petitioner ("Brief of 33 Attorneys General") at 3.

Employing contorted logic, respondents describe the circuit splits as merely differences in how the circuits define economic activity. Opp. 27-28. Yet that very argument concedes confusion among the circuits about how to interpret *Lopez* because it illustrates the difficulties courts have in determining what constitutes "economic activity" under *Lopez*. Further, respondents maintain that the circuit split is "contrived" because the circuits would reach the same result in a particular case notwithstanding their differing constructions of what constitutes "economic" activity. Opp. 27. This case illustrates the fallacy of that position. Respondents' actions forced Brzonkala to end a financial relationship in which she paid tuition to Virginia Tech. Pet. 17-18 n.14. That is certainly a sufficient "economic" connection under the approach, for example, of the Fifth Circuit or the District of Columbia Circuit, which recognize the substantial affect on interstate commerce of non-commercial intrastate activities. *See, e.g., United States v. Bird*, 124 F.3d 667, 675-76 (5th Cir. 1997), *cert. denied*, 523 U.S. 1006 (1998); *Terry v. Reno*, 101 F.3d 1412, 1417 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1264 (1997).

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denied, 118 S. Ct. 2340 (1998). Opp. 28 n.9. Contrary to respondents' charge, the Petition identified Judge Wald's opinion as a single-judge opinion, and explained that Judge Henderson's concurrence was fully consistent with Judge Wald's opinion on all material points for which it was cited. *See* Pet.14 & n.12.

Second, respondents deny that the Fourth Circuit adopted a *per se* rule that intrastate non-commercial conduct that has an indirect effect on interstate commerce cannot substantially affect commerce. Opp. 28-29. This is a clear misreading of the Fourth Circuit's decision, which states that the "attenuated and indirect relationship with interstate commerce" asserted here exceeds Congress' commerce clause authority. App. 51a. The court goes on to criticize Brzonkala's assertion "that the relationship described by [the congressional findings supporting the Act] is direct," stating "it quite simply is not" and finding that "such an attenuated relationship with interstate commerce" is insufficient to withstand constitutional scrutiny. App. 69a-70a. *Accord* App. 64a-68a. This simplistic analysis is at odds with *Lopez*, which eschewed any bright-line test of constitutionality, noting that "[t]hese are not precise formulations, and in the nature of things they cannot be." *Lopez*, 514 U.S. at 567. Similarly, Justice Kennedy's *Lopez* concurrence -- which respondents completely ignore -- amplifies that the Commerce Clause "is not susceptible to the mechanical application of bright and clear lines" and reaffirms "the Court's definitive commitment to the practical conception of the commerce power." *Id.* at 579, 573.

Assuming, arguendo, that respondents' reinterpretation of the Fourth Circuit's decision was correct, the need for review by this Court would still be compelling because respondents essentially deny that the Fourth Circuit adopted any discernible principles in reaching its conclusion that the VAWA civil remedy is unconstitutional. Respondents' primary response to the conflicts the decision below creates is that the Fourth Circuit did not rely on the principles: (1) that "Congress cannot regulate non-economic activity with no interstate nexus"; (2) that there is a "bright line between direct and indirect effects" on interstate commerce; or (3) that an act of Congress may not "intrude upon traditional state concerns." *See* Opp. 26, 28-29.

Respondents are simply wrong. *See, e.g.*, App. 48a-51a, 64a-68a, 69a-70a, 73a-76a. Moreover, if the decision truly lacked those rationales, it would be virtually untethered from any analytic principles, which clearly would warrant this Court's review.

Finally, respondents' contention that Brzonkala fabricated a tension between the decision below and numerous other circuits that uphold Congress' Section 5 power to regulate unconstitutional conduct, Opp. 30, is simply unfounded. Pet. 26-28. By limiting Section 5 laws to those that provide redress against states or state actors, the Fourth Circuit's reasoning conflicts with this Court's decisions upholding Congress' Section 5 power to regulate private conduct. *See, e.g., District of Columbia v. Carter*, 409 U.S. 418, 424 n.8 (1973); *United States v. Guest*, 383 U.S. 745, 762 (1966) (Clark, J., concurring, joined by Justices Black, Fortas), *id.* at 777 (Brennan, J., concurring, joined by Chief Justice Warren, Justice Douglas); *cf. Katzenbach v. Morgan*, 384 U.S. 641, 648-49 (1966). Because the lower court eliminated an entire category of conduct that could fall within the scope of Congress' Section 5 power, the Petition accurately characterized it as "in tension" with the many circuit courts that, while not themselves addressing Congress' authority to regulate private conduct, plainly uphold Congress' authority to regulate conduct that is not constitutionally proscribed. Pet. 27 n.18.

III. Respondents Misread *Lopez* And Ignore The Vital Distinctions Between *Lopez* And This Case.

Respondents characterize the Fourth Circuit decision as a simple application of *Lopez* and maintain that the decision below correctly resolved the issues *Lopez* considered. Opp. 20-26. Respondents' arguments fail to address both: (a) important

issues left open by *Lopez*, which have resulted in inconsistent decisions among the lower courts; and (b) the principled limitations on Congress' commerce power proposed in the Petition. The Brief of 33 Attorneys General seeking this Court's clarification highlights the importance of addressing this confusion in the lower courts. Brief of 33 Attorneys General at 3.

First, respondents suggest that *Lopez* precludes Congress from regulating non-economic activity unrelated to any comprehensive scheme of commercial regulation, and criticize both the United States and Brzonkala for not explaining "how the non-economic nature of the activity should be considered in any analysis under the Commerce Clause." Opp. 20. Yet respondents fail to establish why petitioners should have provided any such explanation. It is abundantly clear that *Lopez* restates the traditional test that "Congress' commerce authority includes the power to regulate those activities [that substantially affect] interstate commerce." *Lopez*, 514 U.S. at 558-59. Under that test, "[i]t is the effect upon interstate commerce . . . , not the source of the injury which is the criterion of Congressional power." *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 121 (1942), *quoted in* Pet. 19. As discussed above, the Fourth Circuit just as clearly held that the VAWA civil remedy was unconstitutional because the source of the injury -- the physical attack -- was not an economic activity, and there was no jurisdictional element. App. 23a-24a. Respondents' attempt to reconcile the decisions on this point is unavailing.

Second, respondents criticize the Petition for failing to propose any meaningful limitations on Congress' commerce power. Opp. 22-24. But the Petition sets forth precisely such limitations. As explained at length, Pet. 10, 18-26, the following vital distinctions between this case and *Lopez*

support upholding the VAWA civil remedy while preserving principled limitations on the commerce power: (1) in enacting the VAWA civil remedy, Congress made extensive and reasonable findings in support of the exercise of its delegated power; (2) the VAWA civil remedy is not a criminal statute and addresses an area the states recognize that they "cannot address . . . adequately by themselves," Brief of 33 Attorneys General at 1; *see also id.* at 3-4; Pet. 6-7 (citing *Crimes of Violence Motivated By Gender: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 103d Cong. 34-36 (1993)) (Letter from Attorneys General); and (3) because the VAWA civil remedy is anti-discrimination legislation that seeks to remove documented and persistent intrastate barriers to the participation of specific groups in interstate commerce and the national economy, it falls within the commerce power as interpreted by this Court in *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 252-53, 257, 260-61 (1964), and *Katzenbach* v. *McClung*, 379 U.S. 294, 300, 302, 304 (1964). *See* Pet. 10, 18-26.

Finally, respondents' contentions concerning Section 5 are unavailing in several respects. While more germane to the merits of the case than this Petition, respondents' argument that Brzonkala presents no evidence that Congress enacted the VAWA civil remedy to remedy Equal Protection violations, Opp. 25, ignores the legislative record addressing that concern. *See, e.g.*, Pet. 5-6 (documenting legislative record). Moreover, that the VAWA civil remedy fails to provide an antidote to every problem with judicial administration documented by Congress, Opp. 25-26, supports rather than detracts from the law's constitutionality because it demonstrates Congress' intent to craft a narrow remedy that avoids the federalism concerns about which respondents complain. Pet. 22-23. *See, e.g.*, *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971) (distinguishing constitutional civil rights law requiring proof of

discriminatory intent analogous to that required by the VAWA civil remedy from general federal tort law).

CONCLUSION

The petition for a writ of *certiorari* should be granted.

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No. 99-5

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ANTONIO J. MORRISON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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UNITED STATES OF AMERICA, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

The United States seeks this Court's review of a decision of the Fourth Circuit, sitting en banc, that Congress lacked the constitutional authority to enact 42 U.S.C. 13981, the provision of the Violence Against Women Act of 1994 (VAWA) that gives victims of gender-motivated violence a private right of action against their assailants. Respondents acknowledge (Br. in Opp. 1) that "[t]he scope of Congressional authority to legislate under the Constitution is an important issue." Respondents do not dispute that the issue of Congress's constitutional authority to enact Section 13981 is a recurring one. See U.S. Pet. 18 & nn.8, 9 (citing 16 cases, in addition to this case, in which the issue has arisen). Nor do respondents identify any reason why this is not an appropriate case in which to resolve that issue definitively.

1. Respondents principally contend that "the fact that the court of appeals found an Act of Congress unconstitutional is not a sufficient ground to grant the petitions." Br. in Opp. 17 (initial capitalizations omitted). Respondents are mistaken. It is a sufficient ground to grant a petition for certiorari that "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). And respondents concede (Br. in Opp. 1) that the questions of federal constitutional law decided by the Fourth Circuit in this case are indeed "important." It is not necessary in such circumstances, as respondents suggest (*id.* at 19), that the court of appeals' decision also implicate a conflict among the circuits or "so far depart[] from the accepted and usual course of judicial proceedings * * * as to call for an exercise of this Court's supervisory power" (Sup. Ct. R. 10(a)).

This Court has consistently granted certiorari, without waiting for a conflict among the circuits, when the United States has sought review of a decision declaring a federal statute unconstitutional. See, *e.g.*, *National Endowment for the Arts* v. *Finley*, 524 U.S. 569 (1998); *Babbitt* v. *Youpee*, 519 U.S. 234 (1997); *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476 (1995); *United States* v. *National Treasury Employees Union*, 513 U.S. 454 (1995); *United States* v. *Edge Broad. Co.*, 509 U.S. 418 (1993); *FCC* v. *Beach Communications, Inc.*, 508 U.S. 307 (1993); *Reno* v. *Flores*, 507 U.S. 292 (1993) (federal regulation). The Court grants review in such cases for good reason. A lower court's decision to invalidate a congressional enactment, which expresses the majority's will in a democratic society, involves the most momentous application of judicial power. See *Rust* v. *Sullivan*, 500 U.S. 173, 190-191 (1991); *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 319 (1985). It is appropriate for the Court expeditiously "to review the exercise of th[at] grave power," *United States* v. *Gainey*, 380 U.S. 63, 65 (1965), so as to assure that the "considered decision of a coequal and representative branch of our Government," *Walters*, 473 U.S. at 319, is not unnecessarily countermanded. See Robert L. Stern et al., *Supreme Court Practice* 185 (7th ed. 1993) ("Where the decision below holds a federal statute unconstitutional * * * certiorari is usually granted because of the obvious importance of the case.").

Although respondents cite (Br. in Opp. 18-19) four cases in which "this Court has denied review when Courts of Appeals have declared statutes unconstitutional," none of those cases involved circumstances similar to those here. In *Valley Broadcasting Co.* v. *United States*, 107 F.3d 1328 (9th Cir. 1997), cert. denied, 118 S. Ct. 1050 (1998) (No. 97-1047), the first case on which respondents rely, the United States, as petitioner, did not even seek plenary review of the Ninth Circuit's decision holding 18 U.S.C. 1304 to be unconstitutional. The petition asked only that the Court "vacate the judgment of the court of appeals and remand the case for further evidentiary proceedings," explaining that "this Court need not reach the underlying First Amendment issues at this time—and indeed would likely find the record * * * inadequate for that purpose" (97-1047 Pet. at 24). It would have been curious for the Court to have instead granted certiorari to review the court of appeals' decision on the merits.[1]

In two of the other cases cited by respondents, the United States opposed certiorari, noting that the court of appeals' decisions had little, if any, practical effect

[1] It was only one year later that the Court decided the constitutionality of 18 U.S.C. 1304 in *Greater New Orleans Broadcasting Co.* v. *United States*, 119 S. Ct. 1923 (1999).

and involved questions that were unlikely to arise again. In *ACORN* v. *Edwards*, 81 F.3d 1387 (5th Cir. 1996), cert. denied, 521 U.S. 1129 (1997) (No. 96-174), although the Fifth Circuit had held that the Lead Contamination Control Act of 1988, 42 U.S.C. 300j-24(d), violated the Tenth Amendment, the United States opposed certiorari because "the decision below has no further practical consequences for the federal effort to address lead contamination in schools" (96-174 U.S. Br. in Opp. at 9). The United States explained that the statute at issue had simply required the States to establish programs, by a specified deadline, to assist schools in remedying lead contamination. The deadline had since passed, all States had established the programs, and the statute imposed no further obligation on the States. *Ibid.* In *Wilson* v. *National Labor Relations Board*, 920 F.2d 1282 (6th Cir. 1990), cert. denied, 505 U.S. 1218 (1992) (No. 90-1362), although the Sixth Circuit had held that Section 19 of the National Labor Relations Act, 29 U.S.C. 169 violated the First Amendment to the extent that it did not excuse employees from joining unions based on personal religious objections, the NLRB opposed certiorari because of the "unusual circumstances" of the case (90-1362 NLRB Br. in Opp. at 12). The NLRB explained that the case was "possibl[y] moot[]" (*ibid.*) and, even if not, that "petitioner's claim of an actual and continuing injury is * * * quite thin and insubstantial" (*id.* at 14), because "even under the court of appeals' conclusion that the provision is unconstitutional, [petitioner] is not entitled to the relief that [petitioner] seeks—relief that is, in any event, essentially duplicative of relief already provided" in a related EEOC proceeding (*id.* at 15 (citation omitted)). The NLRB also noted (*id.* at 16) that the constitutional issue had never arisen in any other case.

The final case cited by respondents, *Rayburn* v. *General Conference of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985), cert. denied, 478 U.S. 1020 (1986), is not one "declar[ing] [a] statute[] unconstitutional" (Br. in Opp. 18). The Fourth Circuit did not invalidate any portion of Title VII of the Civil Rights Act. It simply held that the First Amendment bars courts from entertaining certain Title VII claims—specifically, claims that a church (or other religious body) denied a person a pastoral position on the basis of race or sex. 772 F.2d at 1167-1172. The United States did not participate in the case, as would be expected if the court of appeals' decision posed any significant threat to the constitutionality of Title VII. See 28 U.S.C. 2403.

Those cases thus offer no support for respondents' assertion (Br. in Opp. 19) that "[w]hen a federal statute is declared unconstitutional, this Court has historically required the presence of other factors militating in favor of exercising its certiorari jurisdiction before granting a petition." The cases instead suggest that, in those rare instances where the Court declines to review a lower court decision holding an Act of Congress unconstitutional, the Court has done so because "other factors" indicate that the constitutional question is unsuitable for review. No such factors are present here.

2. Respondents also criticize (Br. in Opp. 20-26) petitioners for not responding to particular aspects of the court of appeals' lengthy opinion, including an observation that the court confined to a single footnote (*id.* at 23). Respondents misunderstand the purpose of a petition for certiorari, which is to provide "[a] direct and concise argument" as to why the case warrants this Court's review. Sup. Ct. R. 14.1(h); see also Sup. Ct. R. 14.3 ("A petition for a writ of certiorari should be stated

briefly."). It is not to engage in a point-by-point refutation of the reasoning of the opinion below. See Robert L. Stern et al., *supra*, at 357 ("The attempt to show error below * * * should not be a long, full-dress argument such as would be proper in the brief on the merits, but a condensed version of such an argument.").

While we believe that our petition adequately identifies the principal errors in the court of appeals' opinion (see U.S. Pet. 19-30), and that a more extended discussion of the merits is unnecessary at this time, we do wish to address certain of respondents' assertions.

First, we do not contend, as respondents claim (Br. in Opp. 21), that "if the activity being regulated is non-economic, it merely imposes a requirement of Congressional findings," or, in other words, that the mere existence of such findings is "dispositive." As explained in our petition (at 19-22), Congress may regulate intrastate non-economic activity under the Commerce Clause if that activity has a substantial effect on interstate commerce. See *United States* v. *Lopez*, 514 U.S. 549, 559 (1995) ("the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce"); accord *Wickard* v. *Filburn*, 317 U.S. 111, 125 (1942) ("[E]ven if [an] activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce.") (quoted in *Lopez*, 514 U.S. at 556). Congressional findings may, however, assist the courts in determining whether Congress could rationally have found the requisite nexus to exist between the regulated activity and interstate commerce, especially where, as here, the nexus may not be obvious to those who have not studied the question. See *Lopez*, 514 U.S. at 563 (explaining that congressional findings "enable us to evaluate the legislative judgment that the activity

in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye"). Here, Congress's explicit findings, supplemented with the extensive legislative record compiled over four years of investigation, demonstrate that gender-motivated violence has a direct and substantial effect on interstate commerce. See, *e.g.*, H.R. Conf. Rep. No. 711, 103d Cong., 2d Sess. 385 (1994) (Conf. Rep.) (finding that gender-motivated violence deters persons "from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved, in interstate commerce").

Second, contrary to respondents' assertions (Br. in Opp. 22-23), the present case stands in marked contrast to *Lopez*, not only because of the explicit congressional findings and extensive legislative record that underlie VAWA, but also because Section 13981 does not present the same federalism concerns as did the Gun-Free School Zones Act of 1990. The legislative record makes clear that Congress acted because the States demonstrably, and admittedly, had failed adequately to address the problem of gender-motivated violence. Indeed, the legislative record establishes a history of systemic discrimination in the States' treatment of violent crimes against women. When Congress responds to a problem with a substantial effect on interstate commerce that the States have failed to address, principles of federalism do not prevent Congress from acting and do not require that the problem go unredressed. This is particularly clear when, as in this case, Congress acts to vindicate civil rights, a paradigmatic federal responsibility. Moreover, as explained in our petition, Section 13981 is crafted to be particularly respectful of federalism concerns. Unlike the Gun-Free School Zones Act, Section 13981 provides an exclusively

civil remedy, does not make criminal conduct that was not criminal under state law, and does not otherwise "effect[] a change in the sensitive relation between federal and state criminal jurisdiction." *Lopez*, 514 U.S. at 561 n.3 (internal quotation marks omitted). And Section 13981 in no way impedes state efforts to address the problem of gender-motivated violence. See Amici Br. of Arizona, *et al.* 3 ("[S]ection 13981 does not interfere with state and local governmental efforts to address the problem of gender-motivated violence.").

Third, respondents dispute (Br. in Opp. 25) that "Congress passed [Section 13981] to remedy Equal Protection violations." In enacting Section 13981, however, Congress expressly invoked its authority under Section 5 of the Fourteenth Amendment as well as under the Commerce Clause. 42 U.S.C. 13981(a). As our petition notes (at 8), moreover, Congress expressly found in enacting Section 13981 that "bias and discrimination in the [state] criminal justice system often deprive[] victims of crimes of violence motivated by gender of equal protection of the laws." Conf. Rep. 385. Congress based that finding, in part, on the reports of many state task forces on gender bias, which documented how state actors, including police, prosecutors, court personnel, and judges, have treated women's complaints of rape, domestic abuse, and other acts of violence as trivial, exaggerated, untruthful, or somehow the woman's own fault. See U.S. Pet. 8-11.

Fourth, respondents suggest (Br. in Opp. 25-26) that Section 13981 is not an appropriate remedy for discrimination in state justice systems, because Section 13981 provides a cause of action against the perpetrators of gender-motivated violence, and not against state actors. But respondents view the remedy provided by Section 13981 too narrowly. Section 13981, while giving victims a remedy for the injury inflicted by their assailants, also gives victims a remedy for the injury inflicted by state actors—*i.e.*, the victims' loss of the opportunity to see justice done against their assailants, as a result of state actors' failure to treat the victims' complaints seriously. As Congress explained, Section 13981 "allow[s] survivors an opportunity for *legal vindication* that the survivor, not the State, controls." S. Rep. No. 545, 101st Cong., 2d Sess. 42 (1990) (emphasis added).[2] Meanwhile, Congress also sought in VAWA to remedy the discrimination in state justice systems in additional ways, such as by providing funds to educate state police and prosecutors about domestic violence. See 42 U.S.C. 3796gg. Congress was entitled to conclude that this multi-pronged approach would most effectively correct the causes and remedy the effects of discrimination in state justice systems against victims of gender-motivated violence.

3. Respondents further argue (Br. in Opp. 26-30) that no circuit conflict exists concerning the constitutionality of Section 13981. We do not contend otherwise. As discussed above, because the court of appeals declared an Act of Congress unconstitutional, this Court's review is warranted in any event.

Finally, while respondents do not dispute that the court of appeals' decision conflicts with 14 district court decisions upholding Congress's authority to enact Section 13981 (U.S. Pet. 18 & n.8), respondents argue (Br. in Opp. 26) that such a conflict is insufficient, in itself, to warrant this Court's review. Again, we do not contend

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[2] It is not inconsistent with Congress's recognition of bias in state justice systems, as respondents suggest (Br. in Opp. 25), to permit victims to bring Section 13981 claims in either federal or state court. A victim may conclude that she will receive a fair hearing in a particular state court, especially given that the victim, not a state prosecutor, controls the process. To date, however, almost all Section 13981 claims have been brought in federal court.

otherwise. The district court decisions demonstrate, however, that the constitutionality of Section 13981 is a recurring question that this Court will inevitably have to decide.[3] Respondents offer no persuasive reason why the Court should not do so in this case.

* * * * *

For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

SEPTEMBER 1999

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[3] As we noted in our petition (at 18 n.9), one district court, in addition to the district court in this case, has held that Congress lacked the constitutional authority to enact Section 13981. See *Bergeron* v. *Bergeron*, No. 96-3445-A, 1999 WL 355954 (M.D. La. May 28, 1999). The United States filed a notice of appeal in *Bergeron*, but the private plaintiff did not. The Fifth Circuit has stayed any further proceedings in *Bergeron* pending the disposition of the petitions for certiorari in this case.

MOTION FILED

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Nos. 99-29 & 99-5

In the Supreme Court of the United States

CHRISTY BRZONKALA,
Petitioner,

v.

ANTONIO J. MORRISON and JAMES LANDALE CRAWFORD,
Respondents.

and

UNITED STATES,
Petitioner,

v.

ANTONIO J. MORRISON and JAMES LANDALE CRAWFORD,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether 42 U.S.C. § 13981, the provision of the Violence Against Women Act of 1994 that creates a private right of action for victims of gender-motivated violence, is a valid exercise of Congress' power under the Commerce Clause of the Constitution.

2. Whether 42 U.S.C. § 13981, is a valid exercise of Congress' power under the Enforcement Clause of the Fourteenth Amendment to the Constitution.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this motion for leave to file the attached brief amicus curiae and brief amicus curiae in support of the petitions for writ of certiorari.[1] Written consent for amicus participation in this case was granted by counsel for petitioners and lodged with the Clerk of this Court. Counsel for Respondents have withheld consent.

Pacific Legal Foundation is the largest and most experienced nonprofit public interest law foundation of its kind in America. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. PLF litigates nationwide in state and federal courts with the support of thousands of citizens from coast to coast. PLF is headquartered in Sacramento, California, and has offices in Miami, Florida; Honolulu, Hawaii; Bellevue, Washington; and a liaison office in Anchorage, Alaska.

PLF has participated in numerous cases concerning the scope of the Commerce Clause and constitutionality of various provisions of federal law. For example, PLF participated as amicus curiae before the United States Supreme Court in *Alden v. Maine*, 67 U.S.L.W. 4601 (1999); *Printz v. United States*, 521 U.S. 98 (1997); *United States v. Lopez*, 514 U.S. 549 (1995); and *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264 (1981). PLF has also participated before lower federal courts addressing the constitutionality of other federal enactments, including

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[1] Pursuant to Supreme Court Rule 37.6, Amicus Curiae Pacific Legal Foundation affirms that no counsel for any party in this case authored this brief in whole or in part; and, furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

appearing as amicus in *National Association of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), *cert. denied*, 118 S. Ct. 2340 (1998); and *Building Industry Association of Superior California v. Babbitt*, 979 F. Supp. 893 (D.D.C. 1997).

PLF contends the lower court correctly decided this case. Nonetheless, PLF supports the petitions for writ of certiorari because PLF believes that the federal courts require further guidance from this Court on the constitutional and legal principles involved. With the exception of the court below, the federal courts of appeal have all but ignored this Court's decision in *United States v. Lopez*. They routinely reject Commerce Clause challenges to all manner of federal legislation without undertaking adequate analysis, and have relegated *Lopez* to an aberration, rather than a statement of the law. It is the position of PLF that, without further guidance from this Court, the lower courts will continue in this vein. The purpose of this brief is to provide this Court with an overview of federal Commerce Clause litigation to demonstrate how the lower courts have incorrectly applied this Court's precedent in *Lopez*. This brief does not address the Petitioners' Fourteenth Amendment argument. PLF believes this brief will provide a perspective not offered by any party supporting this petition.

For these reasons, PLF respectfully requests that this Court grant its motion for leave to file the attached brief amicus curiae.

DATED: August, 1999.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE PACIFIC LEGAL FOUNDATION

The interest of Amicus Curiae Pacific Legal Foundation is set forth in the preceding motion.

STATEMENT OF THE CASE

The federal Violence Against Women Act creates a private right of action against any "person . . . who commits a crime of violence motivated by gender." 42 U.S.C. § 13981(c). Petitioner Christy Brzonkala brought a civil cause of action against the Respondents based upon this provision. Respondents defended the suit by arguing that Congress lacks authority under the Commerce Clause to create this federal right. Petitioner United States intervened to defend the statute.

Relying upon this Court's decision in *United States v. Lopez*, the district court held this law invalid. *Brzonkala v. Virginia Polytechnic Institute*, 935 F. Supp. 779 (W.D. Va. 1996). On appeal, the Court of Appeals reversed in a split decision. *Brzonkala v. Virginia Polytechnic Institute*, 132 F.3d 949 (4th Cir. 1997). But on rehearing, in a 7-4 en banc decision, the Fourth Circuit held that the federal government lacks authority under the Commerce Clause to enact the civil cause of action provision of the Violence Against Women Act. *Brzonkala v. Virginia Polytechnic Institute*, 169 F.3d 820 (4th Cir. 1999). The Petitioners are seeking this Court's review.

SUMMARY OF ARGUMENT

In 1995, this Court decided a landmark Commerce Clause case, *United States v. Lopez*, 514 U.S. 549 (1995). In that case, this Court invalidated the Gun Free School Zones Act, which made it a federal crime for any person to possess a firearm within 1,000 feet of a school. *Lopez*, 514 U.S. at 552. This Court held that the interstate Commerce Clause of Article 1, Section 8, Clause 3, of the Constitution did not stretch so far as to enable Congress to regulate conduct, such as the possession

of a gun in a school zone, having no logically direct connection to the regulation of interstate commerce. *Id.* at 567. That decision was the first Supreme Court decision striking a federal act on Commerce Clause grounds since 1936. *See Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

Lopez revitalized the concept of enumerated powers upon which the United States Constitution and our federalist form of government is based. That decision reinvigorated once-shy litigants to bring Commerce Clause challenges to various other federal enactments having dubious connections to interstate commerce. For example, challenges have been made to the Violence Against Women Act, the Child Support Recovery Act, and the Driver's Privacy Protection Act. Litigants have also challenged assertions of federal jurisdiction over entirely intrastate noncommercial conduct, such as federal prosecutions of intrastate robberies and arsons, and federal agency jurisdiction over local endangered species and isolated wetlands.

Notwithstanding the facts adduced in these cases, the inadequacy of congressional rationales for federal commerce legislation, the unprecedented intrusion of the federal government into state matters such as crime and family law, or, for that matter, the relative strengths and weaknesses of the arguments put forward by counsel in these cases, a majority of the federal courts of appeals have disparaged this Court's decision in *Lopez*.[2] With the exception of the court below, these courts have routinely, and often summarily, rejected challenges based upon the principles and reasoning announced in that case. It is this refusal to faithfully apply *Lopez* that demands this Court's review.

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[2] Some federal district courts have found certain federal acts, or applications of federal acts, unconstitutional under *Lopez*. However, when appealed, the circuit courts of appeals have consistently overturned these decisions. *See, e.g., United States v. Mussari*, 894 F. Supp. 1360 (D. Ariz. 1995), *overruled*, 95 F.3d 787 (9th Cir. 1996) (constitutionality of Child Support Recovery Act).

This case does not present a traditional basis for granting a petition for writ of certiorari. There is no conflict in the circuits on the constitutionality of this statute.[3] The court below did not depart from this Court's decisions, and did not decide any questions of constitutional law that this Court has left unsettled. Rather, this case merits consideration by this Court, because *the Court below is the only federal court of appeals that has correctly followed and applied this Court's precedents*. Despite the relative longevity of the *Lopez* decision, particularly in light of the plethora of cases that have legitimately raised precisely the issue decided in that case, it is clear the lower courts will continue to disregard this Court's ruling unless this Court exercises its supervisory powers by providing further clarification and guidance to the lower courts on the principle of enumerated powers.

ARGUMENT

I

NOTWITHSTANDING *UNITED STATES v. LOPEZ*, THE COMMERCE CLAUSE HAS BEEN CONSTRUED BY FEDERAL COURTS TO ALLOW CONGRESS AND ANY FEDERAL AGENCY TO EXERCISE POWER UNRESTRAINED BY LIMITATIONS IMPOSED BY CONNECTIONS TO INTERSTATE COMMERCE

A. Federal Courts Have a Role in Curbing Federal Overreaching, Particularly Where Expansions of the Commerce Power Address Matters More Appropriately Addressed by State Police Powers

Before *United States v. Lopez* Congress's commerce powers were unlimited. "[One] wonder[s] why anyone would make the mistake of calling it the

---

[3] No other federal courts of appeals have addressed the constitutionality of the specific provision at issue in this case. However, some federal district courts have reached conflicting results. *See, e.g., Anisimov v. Lake*, 982 F. Supp. 531 (N.D. Ill. 1997).

> Commerce Clause instead of the 'Hey, you-can-do-whatever-you-feel-like Clause.'"

United States v. Wall, 92 F.3d 1444, 1454 (6th Cir. 1996) (Boggs, J., concurring in part and dissenting in part) (citations omitted). And since this Court's 1995 decision in *Lopez*, litigants have persisted in the hope that the concept of enumerated powers, a bedrock principle of the United States Constitution, has been revitalized. No longer would federal courts merely observe the formality of paying lip-service to constitutional limitations on limited federal power, but would in fact assume the role granted to them by Article III: "to declare all acts contrary to the manifest tenor of the constitution void." The Federalist No. 78, at 394 (Alexander Hamilton) (Garry Wills ed., 1982). Alas, that hope has not been fulfilled. Instead, this Court's decision in *United States v. Lopez* has been relegated to the status of an aberration in an almost seamless record of federal court acquiescence to congressional incursions into matters having the merest pretension of involving interstate commerce.

Lopez did nothing to stem the tide of congressional interference with matters more properly falling within the sphere of state and local regulation. Indeed, *United States v. Wall*, cited above, is particularly illustrative of the peculiar degree to which Congress will reach into nonfederal matters. In that case, the Sixth Circuit Court of Appeals affirmed the conviction of several defendants engaged in a gambling enterprise, holding that the federal statute there was legitimately within Congress' commerce powers. *Wall*, 92 F.3d at 1452. The statute made it a federal crime to participate in an "illegal gambling business" of a certain size. Quite apart from the question of whether intrastate gambling is or is not interstate commerce, the statute itself is a revelation. It states, in pertinent part:

> (b) As used in this section--
>
> (1) "illegal gambling business" means a gambling business which--
>
> (i) *is a violation of the law of a State or political subdivision in which it is conducted.*

18 U.S.C. § 1955 (emphasis added). That is, the statute essentially made it a federal crime to commit a state crime. Apparently, in its zeal to do *something* about the evils of gambling, it did not even faze Congress that the law it was passing was, by its own terms, completely unnecessary.

The inherent desire of Congress to pander to popular sentiment by remedying any and every perceived and politically useful evil has, as a matter of pragmatism, resulted in an institutional insensitivity to constitutional concerns in general and federalism in particular. However, the political considerations which make Congress' avoidance of difficult constitutional choices understandable, even if not admirable, has, at least since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), no place in the judicial branch. The law of the Constitution, that case held, is superior to legislative law, and "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Id.* at 177. Yet despite this Court's efforts in *Lopez* to say what the law is, many federal appellate courts have opted instead to acquiesce with unquestioning deference to the will, if not the whim, of the legislative branch by sanctioning laws addressing any subject Congress may choose. This degree of deference undermines the role, indeed the very purpose, of the federal courts. "It is far more rational to suppose that the courts were designed . . . to keep the [legislature] within the limits assigned to their authority." The Federalist No. 78, at 395 (Alexander Hamilton).

Thus, while it might be expected that *Lopez* would have no effect in curbing congressional decisionmaking, it should not be countenanced by this Court that *Lopez* is similarly having little or no effect on judicial decisionmaking. Yet, since that decision, among the dozens of cases that have come before federal courts entertaining Commerce Cause challenges to federal legislation, federal agency rulemaking, and federal jurisdiction, these lower courts have repeatedly "stretched the limits of Congress' commerce powers and, some would argue, the bounds of reason" to sustain federal action. *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1396 (9th Cir.), *cert. denied*, *Cargill, Inc. v. United States*, 516 U.S. 955 (1995). In short, as demonstrated below, despite *Lopez*, Congress may continue to legislate at will without restraint from the federal courts.

B. A Brief Overview of Federal Judicial Decisionmaking Since *Lopez* Demonstrates That Lower Federal Courts Have Limited Its Holding to the Point of Nonexistence

Since this Court's decision in *Lopez*, the lower federal courts have had ample time to digest its reasoning, and ample opportunity to apply it to all manner of federal action. Yet, while these courts readily acknowledge the correctness of the principles announced there, they have so far succeeded in distinguishing virtually every other federal action from the situation this Court confronted in *Lopez*. The ingenuity of these rationales has not merely rendered *Lopez* a nullity, these rationales have rendered the very concept of enumerated powers a nullity.

For example, in *United States v. Michael R.*, 90 F.3d 340 (9th Cir. 1996), the Ninth Circuit upheld the conviction of a juvenile for possession of a firearm. The statute provided:

> It shall be unlawful for any person who is a juvenile to knowingly possess--
>
> (A) a handgun . . . .

18 U.S.C. § 922(x)(2). The youth challenged the constitutionality of the statute under *Lopez*. *Michael R.*, 90 F.3d at 343. Flatly contradicting the analysis put forward by this Court, the Ninth Circuit rejected the challenge, opining: "possession of a handgun by a juvenile implicates interstate commerce through the manufacturing process and by its deterrent effect on interstate travel." *Id.* at 345. And despite the fact that the statute at issue was entirely silent on the issue of drugs, the Ninth Circuit decided to delve into the manufacturing process itself, by fabricating its own interstate commerce rationale:

> We also find a nexus between this statute and Congress's efforts to control firearms and drug trafficking. In today's drug culture, it is not uncommon for runners to be under 18 years old. And as reflected by the crime statistics, many of them carry guns. It is logical, then, that a statute regulating the sale, transfer, and possession of handguns by juveniles could have a substantial effect in curbing the illegal flow in commerce of drugs and firearms.

Id. Thus, according to the Ninth Circuit, it was merely Alfonso Lopez's good fortune that he was being convicted under a law where Congress had merely sought to regulate guns in a school zone. Had Congress instead chosen to regulate all gun possession everywhere, he would have fallen squarely within the bounds of federal commerce regulation.

If the Ninth Circuit's analysis in *Michael R.* is correct, the flaw with the statute in *Lopez* was that Congress had not drafted it broadly enough. That is, in order to cure defective legislation, Congress need only draft its statutes so broadly that they legitimately encompass at least *some* interstate commerce activity (here, a sale), however remote that activity may be to the activity *actually* being regulated by the statute. That

spurious premise is one the lower courts have relied upon in upholding federal regulation of private, intrastate, noncommercial activities.

But ironically, the fact that the Ninth Circuit felt it necessary, after *Lopez*, to reach its decision by at least engaging in its dubious justification is to that court's credit. Other federal courts have found such attenuated leaps entirely unnecessary. Thus, in *United States v. Cardoza*, 914 F. Supp. 683 (D. Mass. 1996), the court upheld the same statute, stating:

> As *Lopez* demonstrates, handgun possession--particularly handgun possession by juveniles--is subject to federal regulation because, while one specific instance of possession may not by itself have the requisite substantial impact upon interstate commerce, it can "through repetition elsewhere, substantially affect . . . interstate commerce."

Id. at 687 (citing *Lopez*, 514 U.S. at 567). The quoted statement in *Lopez* literally said "[t]he possession of a gun in a local school zone *is in no sense an economic activity* that might, through repetition elsewhere, substantially affect any sort of interstate commerce." *Lopez*, 514 U.S. at 567 (emphasis added). Apparently, that court found in this Court's plain language that *Lopez* means exactly the opposite of what was said.

Modern Commerce Clause jurisprudence, at least in the lower courts, holds that the mere movement of any item in interstate commerce renders that object subject to federal regulation in perpetuity, such that the simple possession of the object, let alone any activity involving the object, may itself be declared a federal crime.[4] In fact, in *United States v. Winningham*, 953 F. Supp. 1068, 1076 (D. Minn. 1996), a federal court held that the one-time interstate movement of a *component* of an object rendered that object subject to federal jurisdiction in perpetuity.[5]

[4] In *Scarborough v. United States*, 431 U.S. 563 (1977), this Court upheld a conviction under a federal statute banning the possession of a (continued...)

Given this state of affairs, one is left to ponder why the Framers of the Constitution bothered to confer additional powers upon Congress through 17 specific enumerations. In other words, Article I's grants of authority to Congress to create patents and copyrights and to raise armies are superfluous, since patented devices daily move in interstate commerce, and war entails the use of objects manufactured or shipped in interstate commerce. In short, the mere fact of interstate commerce has rendered virtually every activity connected with a manufactured object subject to federal control.

Congress may also regulate any activity so long as anyone involved in the activity is engaged in interstate commerce. For example, Congress may federalize any old garden-variety state crime, such as robbery, so long as it involves someone engaged in commerce, regardless of whether the crime itself involves

[4](...continued)
firearm by a convicted felon. In so holding, this Court found the fact that the firearm had once moved in interstate commerce was sufficient to meet the jurisdictional element of the crime, regardless of the fact that the felon had possessed the firearm for a considerable period of time prior to his felony conviction. If Congress may regulate the mere possession of any object in perpetuity on the basis that it once moved in interstate commerce, Congress may regulate virtually everything in a person's home (including the home) and perhaps any activity connected to it. This appears to be in direct contravention of this Court's later statement in *Lopez* that a commerce rationale must have *some* limits. *See Lopez*, 514 U.S. at 564.

[5] The court held that the prior movement of unexposed Polaroid film in interstate commerce was sufficient to establish federal jurisdiction for possession of pornographic photographs taken intrastate with that film. *United States v. Winningham*, 953 F. Supp. at 1076.

interstate commerce. In *United States v. Pettiford*, 934 F. Supp. 479 (D. Mass. 1996), a Hobbs Act conviction was upheld where the defendant stole $200 from an auto body shop. *Id.* at 483. The defendant challenged the application of the Hobbs Act on the ground that it did not meet the "substantial effects" test of *Lopez*. The court there had no trouble dispensing with *Lopez*, relying upon the "depletion of assets" theory developed by some courts of appeals. Its analysis:

> Under this theory, "'commerce is affected when an enterprise, which is either actively engaged in interstate commerce or customarily purchases items in interstate commerce, has its assets depleted . . . , thereby curtailing the victim's potential as a purchaser of goods.'" [Citations omitted.]
>
> . . . .
>
> . . . [I]n the instant case, the government presented evidence that Stadium Auto Body engages in interstate commerce. For example, Stadium accepts national credit cards as payment for services rendered and receives reimbursement from insurance companies that operate nationwide. In addition, Stadium orders sheet metal from a company in Connecticut and obtains other parts from companies in New Hampshire and Rhode Island. That the government tendered no evidence that credit card slips were stolen, that the stolen cash was proceeds from national insurance companies or that the stolen money would have been used to purchase parts from out of state companies is inconsequential. *Given that Stadium engages, at all, in interstate commerce, one might divine that some or all of the $200 stolen was earmarked to buy materials from out of state.* The minimal depletion of assets and its potential impact on Stadium's commercial activity, albeit slight, is

> sufficient evidence of a reasonable probability of a *de minimis* effect on interstate commerce to sustain a probable cause finding of a Hobbs Act violation.

Id. at 482-83 (emphasis added). The logical result of this rationalization is obvious. The "depletion of assets" theory is adaptable to the theft or destruction of any property at all. This theory would authorize a general federal police power over virtually any crime, based solely on theoretical or potential effects on interstate commerce.

Other federal courts have concluded that the interstate commerce impact required for a Hobbs Act violation is so minimal that it need not even exist. In *United States v. Woodruff*, 941 F. Supp. 910 (N.D. Cal. 1996), the defendant challenged his Hobbs Act prosecution for the entirely intrastate robberies of three jewelry stores. *Id.* The district court granted the defendant's motion for acquittal after eliciting evidence from the victimized store owners that, though the stores themselves did engage in some interstate commerce, the robberies would have no impact on any interstate commerce in which they were engaged. *Id.* at 924-25. The Ninth Circuit reversed: "We have since held that *Lopez* did not render our use of the *de minimis* standard in Hobbs Act robbery cases constitutionally infirm." *United States v. Woodruff*, 122 F.3d 1186 (9th Cir. 1997). In short, it was enough that the stores engaged in some interstate commerce to bring the conduct under federal Commerce Clause jurisdiction. Yet, what crime victim, whether an individual or an entity, whether the crime is a robbery, murder, assault, or mugging, does not engage in interstate commerce?

The relatively simple act of stealing a wallet amply meets a multitude of federal judicial interstate commerce tests. If the wallet itself or the money inside it once moved in interstate commerce, it can be reached under the *Scarborough* or *Winningham* tests. If the wallet contains credit cards or the theft is insured, it meets the *Pettiford* or *Woodruff* tests. All

thefts, actually or theoretically, diminish one's ability to engage in untold transactions involving interstate commerce: the theft of a mere quarter could deprive a person from making an interstate telephone call.

Based on these precedents, federal courts have essentially adjudged Congress to be liberated from observing the "interstate" limitations on the commerce governed by Article I, Section 8, Clause 3. Congress may regulate any item that once moved in interstate commerce, *Scarborough, supra*; any item whose components once moved in interstate commerce, *Winningham, supra*; any item that could be used to affect commerce, *Michael R., supra*; and any activity involving a commercial enterprise, *Pettiford, supra*, even where that activity has no effect on interstate commerce, *Woodruff, supra*.

Yet these constructions still do not approach the limits of federal power, because the existence of actual commerce can be a superfluity as well. In *United States v. Hallmark Construction Company*, 14 F. Supp. 2d 1069, 1074 (N.D. Ill. 1998), a federal court upheld federal agency jurisdiction over the filling of an isolated wetland against a *Lopez* challenge. Following circuit precedent, the court held that because

> the cumulative loss of wetland habitats has reduced the population of many bird species and has impaired the ability of people to hunt, trap, and observe those migratory birds

federal regulation of intrastate isolated wetlands is valid under the Commerce Clause. *Id.* at 1074-75. That is: (1) migratory birds sometimes use wetlands; (2) there is interstate commerce in hunting, trapping, and observing migratory birds; (*see Hoffman Homes, Inc. v. Administrator, United States Environmental Protection Agency*, 999 F.2d 256-61 (7th Cir. 1993)); (3) filling in a wetland may diminish habitat of migratory birds; so, (4) therefore, filling in a wetland may ultimately impact interstate commerce in hunting, trapping, and observing

migratory birds. In sum, if a duck may wish to use your land, Congress may invoke its commerce authority to regulate it.

Nonetheless, what is interesting about the "glancing duck" rationale is not its absurdity, but the fact that the government bothered to fabricate a link between wetlands and commerce at all. In *National Association of Home Builders v. Babbitt (NAHB)*, 130 F.3d 1041 (D.C. Cir 1997), *cert. denied*, 118 S. Ct. 2340 (1998), the court dispensed with the necessity of identifying an actual link between a regulated activity and interstate commerce. In that case, the court held that the federal government could regulate the intrastate isolated habitat of the Delhi Sands flower-loving fly, a species whose entire population exists within a narrow area of Southern California. *Id.* at 1044. Purporting to rely upon *Lopez*, the court reasoned: biodiversity has some indeterminate effect on present and future possibilities of interstate commerce; therefore, the federal government may regulate fly habitat on the basis that the fly plays some part in the world's biodiversity.[6] *Id.* at 1052-54. *See also Building Industry Association of Superior California v. Babbitt*, 979 F. Supp. 893 (D.D.C. 1997). Thus, in going to such lengths to develop its migratory bird rationale, the Army Corps of Engineers is being miserably shortsighted. Under the rationale of *NAHB*, it is immaterial whether birds are local or domestic, migratory or stationary, seen, eaten, hunted, shipped, or traded. Birds themselves, simply by virtue of their membership in nature's kingdom, affect interstate commerce.

In short, there is no object and no human conduct that is beyond federal power, barring, perhaps, a narrow range of

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[6] The two-judge majority in that case could not agree on how regulation of fly habitat had a substantial effect on interstate commerce. *See NAHB*, 130 F.3d at 1057-60 (Henderson, J., concurring). This inability to agree, by itself, demonstrates the obscurity, if not absence, of any asserted connections between insect habitat and interstate commerce. It also shows the extreme lengths to which the federal courts will go to uphold congressional power. What does not affect "biodiversity"?

human conduct that happily falls within the protection of the Bill of Rights. The cases cited here represent a small cross-section of federal Commerce Clause jurisprudence since *Lopez* and, with the single exception of the court below,[7] the federal appellate courts have relegated *Lopez* to an inconsequential blip on an otherwise unbroken landscape of unlimited federal power. This is not to say that all of the laws that have been challenged as falling outside of Congress' Commerce Clause power have indeed been beyond congressional authority, or should have been found so by the federal courts in applying *Lopez*. However, given the sheer breadth of matters that these courts have found to be within federal authority to regulate, it is difficult, if not impossible, to avoid arriving at the rather implausible conclusion that, according to a substantial majority of the federal courts that have addressed the issue of Commerce Clause jurisdiction since *Lopez*, the only conceivable law that is beyond federal power to enact is one that regulates the possession of guns in school zones. This Court should grant the petitions for writ of certiorari to dispel this erroneous view of the federal commerce power.

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[7] The Fourth Circuit also bucked the trend with its decision in *United States v. Wilson*, 133 F.3d 251, 257 (4th Cir. 1997), holding that the Army Corps of Engineers had exceeded its authority in enacting a regulation that sought to regulate waters that "*could affect*" interstate commerce. The federal government did not petition this Court for a review of that decision; instead, it is currently enforcing its regulation in every other circuit, and has issued separate jurisdictional guidelines for its offices in the Fourth Circuit.

II

FOR THE FEDERAL JUDICIARY TO MAINTAIN ITS PROPER ROLE IN THE CONSTITUTIONAL SYSTEM, THIS COURT MUST PROVIDE THE LOWER FEDERAL COURTS WITH ADDITIONAL GUIDANCE ON DISTINGUISHING BETWEEN LEGITIMATE AND ILLEGITIMATE EXERCISES OF FEDERAL POWER UNDER THE COMMERCE CLAUSE

> The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing; if these limits may, at any time, be passed by those intended to be restrained?

Marbury, 5 U.S. at 176. The answer, of course, is none. And the value and purpose of a written constitution is likewise rendered a nullity where federal courts abdicate their responsibility to apply the Constitution's restraints to Congress.

The undue deference shown by federal courts to Congress' determinations of its own authority in principle and in fact upsets the balance of power between the three branches of the federal government, and, at heart, the constitutional system itself. But, though some lower courts have undoubtedly been wrong in yielding their own judgment to that of Congress, in some respects, it is difficult to fault them for exercising caution, if it may be called such, in invoking *Lopez* to overturn federal excesses. For example, in *Lopez* itself, this Court preserved it's prior Commerce Clause precedents by recognizing subtle distinctions between the statute at issue in *Lopez* and the

statutes challenged in other cases without articulating the basis for those distinctions.[8]

The observations made by the Sixth Circuit in *United States v. Wall* illustrate the problem. The majority in that case upheld a federal statute against a Commerce Clause challenge, stating:

> Until the Supreme Court provides a clearer signal or cogent framework to handle this type of legislation, this court is content to heed the concurrence of two Justices that the history of Commerce Clause jurisprudence still "counsels great restraint."

Wall, 92 F.3d at 1452 (citing *Lopez*, 514 U.S. at 568 (Kennedy, J., concurring)). The Sixth Circuit has essentially taken the position that, even though it is fully aware of *Lopez*, it is not entirely certain what this Court said in that case or, for that matter, whether this Court actually intended what it said. And the majority of its sister circuits have followed suit. Justice Boggs' observation in *Wall* is descriptive of the current state of affairs: "I read the Kennedy-O'Connor concurrence to sound a note of caution about the scope of *Lopez*, not a note of paralysis." *Wall*, 92 F.3d at 1455 (Boggs, J., concurring in part and dissenting in part). "Paralysis" is an apt description of post-*Lopez* Commerce Clause jurisprudence. While the federal courts endlessly ponder and ruminate upon *Lopez*, as a practical matter, it is the dissent in *Lopez* that appears to be carrying the day. Barring the Fourth Circuit's modest and painstakingly

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[8] For example, this Court did not fully explain *Wickard v. Filburn*. *Lopez*, 514 U.S. at 560. Yet, as Richard Epstein observed, "Could anyone say with a straight face that the consumption of homegrown wheat is 'commerce among the several states?'" Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 Va. L. Rev. 1387, 1451 (1987).

thorough forays into applying *Lopez*,[9] the federal courts of appeals have reached an impasse.

This impasse is itself worthy of this Court's notice. And while it may be peculiar to seek review of a decision correctly decided, the present case nevertheless presents a problem in need of this Court's resolution. It is not merely the constitutional question dealing with the scope of the commerce power that is on trial, but the role of the judiciary itself, and the integrity of the appellate system. The longer federal courts are allowed to continue to misapply, ignore, or limit this Court's decision in *Lopez*, the less clear it becomes what role, if any, the federal courts play in maintaining the checks and balances that sustain our federal system. And if the lower federal courts are free to selectively employ this Court's precedents to reach any preferred result, there is little need for this Court's review of any question of law. In short, this Court should grant the petitions for writ of certiorari to protect the integrity of the federal judiciary as set out in Article III of the Constitution. The court below did not merely decide the law correctly, it imbued itself with some small measure of constitutional purpose.

As stated above, traditional reasons for granting a writ of certiorari are not apparent in this case. There is no conflict in the circuits on the constitutionality of this particular statute. The court below has neither decided an important question of

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[9] Despite any claims made by Petitioners, the Fourth Circuit has been cautious in applying *Lopez*. For example, as pointed out in Footnote 7 above, in *Wilson*, the Fourth Circuit stopped short of invalidating the Army Corps' wetlands regulation on Commerce Clause grounds, instead finding that the regulation was *ultra vires*. *Wilson*, 133 F.3d at 257. The Fourth Circuit upheld the Freedom of Access to Clinics Act against a Commerce Clause challenge *Hoffman v. Hunt*, 126 F.3d 575 (4th Cir. 1997), and its decision in *Condon v. Reno*, 155 F.3d 453 (4th Cir. 1998), *cert. granted*, 67 U.S.L.W. 3696 (1999), striking the Driver's Privacy Protection Act as violating the Commerce Clause, relied upon this Court's Tenth Amendment precedents.

federal law in contravention of this Court's precedents, nor has it sought to resolve an important question of law left unsettled by this Court. Indeed, the decision below bears no legal flaws; remarkably, it adheres almost slavishly to the analysis and rationale of this Court's decision in *Lopez*. Nonetheless, this Court should grant the petitions to establish that *Lopez* remains the law, to provide further guidance to the lower federal courts in applying the law, and to reaffirm, rather than disavow, the precedent established in *Marbury v. Madison*, that Article III obligates this Court "to say what the law is." *Marbury*, 5 U.S. at 177.

CONCLUSION

Since *United States v. Lopez* was decided by this Court in 1995, litigants have brought many Commerce Clause challenges to federal legislation, federal regulatory authority, and federal jurisdiction over a broad range of private and local matters. Yet despite the copiousness of these challenges to an unmitigated flow of federal legislation on matters ranging from criminal law, to family law, to land use, most of the federal courts have uniformly and routinely rejected these challenges. The Court below stands as the rare exception to this pattern of federal court subservience to congressional will. The court below, instead, assiduously adhered to this Court's decision in *Lopez* by finding that Congress lacks the authority to create a private civil cause of action for conduct having no logical or rational connection to interstate commerce.

Petitioners seek this Court's review on the theory that the decision below is flawed, and should be overturned. But the decision below is neither flawed in its understanding of the law nor in its application of the law to the question before it. Nevertheless, amicus supports the petitions for writ of certiorari. The federal courts have unquestionably demonstrated that they require additional guidance from this Court on the question of law presented. Further, because the lower federal courts have

failed to enforce constitutional limitations on federal power by faithfully following this Court's decision in *Lopez*, the constitutional role of the Courts under Article III to maintain the balance of power between the coordinate branches has been compromised, and this Court's authority to establish the meaning of the Constitution has been undermined.

For these reasons, Amicus respectfully requests that this Court grant the Petitions for Writ of Certiorari.

DATED: August, 1999.

Respectfully submitted,

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In The

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

vs.

ANTONIO J. MORRISON, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF THE STATES OF ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, GEORGIA, IDAHO, ILLINOIS, KANSAS, KENTUCKY, MAINE, MARYLAND, MINNESOTA, MISSOURI, MONTANA, NEVADA, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OKLAHOMA, OREGON, RHODE ISLAND, TENNESSEE, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA, AND WISCONSIN, AND THE COMMONWEALTHS OF MASSACHUSETTS AND PUERTO RICO, AND THE TERRITORY OF GUAM, AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTRODUCTION

The thirty-one amici States, the Commonwealth of Puerto Rico, and the Territory of Guam urge this Court to grant the petition because the court of appeals' decision invalidates legislation that the States believe is a critical component in alleviating the national problem caused by violence against women. The petition requests review of the court of appeals' decision to strike down 42 U.S.C. § 13981, the civil rights provision of the Violence Against Women Act of 1994, as exceeding Congress's authority to regulate interstate commerce. Because the amici agree with Congress that gender-based violence substantially affects interstate commerce and the States cannot address this problem adequately by themselves, the amici urge the Court to review the Fourth Circuit's ruling that section 13981 exceeds Congress's commerce power.

INTEREST OF THE AMICI STATES

The state Attorneys General overwhelmingly supported the enactment of the Violence Against Women Act, including the creation of a specific federal civil rights remedy for the victims of gender-based crimes, because the existing system for dealing with violence against women was inadequate. *See Crimes of Violence Motivated by Gender Hearing: Before the Subcomm. on Civil and Constitutional Rights of House Comm. on the Judiciary*, 103d Cong., 1st Sess. 34-36 (1993) (letter from 41 Attorneys General from 38 States, the District of Columbia, and two territories). Each of the amici is acutely aware that violence against women continues to be a widespread problem

that requires the remedies that are now provided by the Violence Against Women Act. The amici are interested in protecting victims of gender-based violence in their States and believe that those victims are entitled to the benefits of the private remedies provided in section 13981.

REASONS FOR GRANTING THE PETITION

As the petition by the United States compellingly explains, this Court should review the federal question raised both because the court of appeals exercised the "grave power of annulling an Act of Congress," *United States v. Gainey*, 380 U.S. 63, 65 (1965), and because "it placed unwarranted limits on Congress's authority to address a national problem of the first magnitude." Petition at 17. The amici wish to amplify several concerns that make this case especially appropriate for review.

First, the Attorneys General for the amici well understand the adverse effects caused by the widespread incidence of violence against women. While the victims suffer the most severe and immediate effects of domestic violence, there are also harmful consequences for state institutions – state and local governments, law enforcement agencies, courts, schools, college campuses, and various public health and human service agencies. Domestic violence adversely affects interstate commerce through its impact in homes, the workplace, and the broader community. The Attorneys General for each of the amici also recognize that domestic violence is a pervasive and deeply entrenched problem within our society.

The Violence Against Women Act, including section 13981, is a necessary and proper means to address this problem.

Second, the Court should clarify whether Congress's commerce power extends to the regulation of non-economic activity when Congress makes specific findings, supported by an extensive legislative record, that the activity has a significant effect on interstate commerce. Relying on *United States v. Lopez*, 514 U.S. 549 (1995), the Fourth Circuit concluded that "[b]ecause Section 13981 neither regulates an economic activity nor includes a jurisdictional element," it cannot be upheld as a permissible exercise of Congress's commerce power. Pet. App. at 31a. However, the majority's decision conflicts with fourteen district court rulings that have found section 13981 within Congress's power under the Commerce Clause. *See* Petition at 18 n.8. By reviewing this case, the Court could clarify the scope of Congress's commerce clause powers to address the problem of violence against women and also thereby provide guidance for Congress and the States in their future efforts to resolve national problems cooperatively.

Third, the principles of federalism do not require invalidation of section 13981 because (1) the connection between gender-motivated violence and interstate commerce is direct and expressly established by the Violence Against Women Act's legislative record and (2) section 13981 does not interfere with state and local governmental efforts to address the problem of gender-motivated violence. The Court therefore does not encounter the same federalism concerns in this case as those it noted

in *Lopez*. *See* 514 U.S. at 561 n.3 (noting that the legislation displaced state policy choices).

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted,

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(31) (27)

Nos. 99-5 and 99-29

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ANTONIO J. MORRISON, ET AL.

CHRISTY BRZONKALA, PETITIONER

v.

ANTONIO J. MORRISON, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED: JUNE 25, 1999
CERTIORARI GRANTED: SEPTEMBER 28, 1999

48 pp

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DOCKET No. 96-1814

BRZONKALA, ET AL., PLAINTIFF-APPELLEE

v.

VPI STATE UNIVERSITY, ET AL., DEFENDANT-APPELLANT

DOCKET ENTRIES

DATE	PROCEEDINGS
1996	
	* * * * *
6/11/96	Civil case docketed.
	* * * * *
9/16/96	Amended notice of appeal filed in the District Court on 9/13/96.
	* * * * *
9/24/96	CLERK ORDER FILED consolidating case 96-2316 with 96-1814.
	* * * * *

DATE	PROCEEDINGS
11/18/96	Brief and joint appendix filed by Appellant Christy Brzonkala in 96-1814.
11/18/96	Brief filed by Appellant/intervenor US in 96-2316.
	* * * * *
12/20/96	Brief filed by Appellee VPI State Univ in 96-1814.
12/23/96	Brief filed by Appellee Antonio J. Morrison in 96-1814, Appellee James Landale Crawford in 96-1814, Appellee Antonio J. Morrison in 96-2316, Appellee James Landale Crawford in 96-2316.
	* * * * *
1997	
	* * * * *
1/8/97	Reply brief filed by Appellant US in 96-2316.
1/8/97	Reply brief filed by Appellant Christy Brzonkala.
	* * * * *
6/4/97	Oral argument heard.

DATE	PROCEEDINGS
	* * * * *
12/23/97	Published, authored opinion filed.
12/23/97	Judgment order filed. Decision: Reversed and Remanded. DISSENT.
1998	
	* * * * *
1/20/98	Petition filed by Appellee VPI State Univ in 96-1814 for rehearing.
	* * * * *
2/4/98	Petition filed by Appellee Antonio J. Morrison in 96-1814, Appellee James Landale Crawford in 96-1814, Appellee Antonio J. Morrison in 96-2316, Appellee James Landale Crawford in 96-2316 for rehearing.
2/5/98	COURT ORDER filed granting rehearing in banc.
2/5/98	Case reopened.
	* * * * *
2/20/98	Supplemental intervenor brief filed by United States.

DATE	PROCEEDINGS
2/23/98	Supplemental brief filed by Appellant Christy Brzonkala in 96-1814.
2/23/98	Supplemental brief filed by Appellee Antonio J. Morrison in 96-1814, Appellee James Landale Crawford in 96-1814, Appellee Antonio J. Morrison in 96-2316, Appellee James Landale Crawford in 96-2316.
2/24/98	Supplemental brief filed by Appellee VPI State Univ in 96-1814.
3/3/98	Oral argument heard in banc before JHW, HEW, FDM, SJE, WWW, PVN, CHH, JML, KJW, MBM, DGM.
	* * * * *
1999	
	* * * * *
3/5/99	Judgment order filed. Decision: Affirmed. Separate concurring and dissenting opinions were written.
	* * * * *
4/27/99	Mandate issued.
	* * * * *

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

CIVIL ACTION No. 95-1358

CHRISTY BRZONKALA, PLAINTIFF

v.

VIRGINIA POLYTECHNIC AND STATE UNIVERSITY, ET AL., DEFENDANTS

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
12/27/95	1	COMPLAINT (w/) Attachments; Filing Fee $120.00; Receipt # 73268; Service due 4/25/96 for James Landale Crawford, for Antonio J. Morrison, for VP & SU (eh) [Entry date 12/29/95]
		* * * * *
3/1/96	6	AMENDED COMPLAINT by Christy Brzonkala amending [1-1] complaint against Cornell D. Brown, William E. Landsidle Service due 6/29/96 (rc) [Entry date 03/01/96]

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
3/5/96	19	MOTION to Dismiss Amended Complaint by Antonio J. Morrison (kh) [Entry date 03/05/96]
3/5/96	20	MOTION to Dismiss Plaintiff's Amended Complaint by VP & SU, & William E. Landsidle (Attorney Kay Kurtz Heidbreder) (kh) [Entry date 03/05/96]
		* * * * *
3/11/96	—	MEMORANDUM by Christy Brzonkala in opposition to [20-1] motion to Dismiss Plaintiff's Amended Complaint by VP & SU (eh) [Entry date 03/11/96]
		* * * * *
3/15/96	—	MEMORANDUM by Christy Brozonkala in opposition to [19-1] motion to Dismiss Amended Complaint by Antonio J. Morrison (eh) [Entry date 03/15/96]
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
3/25/96	28	NOTICE to the Court of Intention to Intervene under 28 USC 2403(a) by USA (eh) [Entry date 03/25/96]
		* * * * *
4/1/96	31	MOTION to Dismiss [16-1] Amended Complaint by Cornell D. Brown (kh) [Entry date 04/01/96]
		* * * * *
4/1/96	32	MOTION to Dismiss Amended Complaint by James Landale Crawford (kh) [Entry date 04/01/96]
		* * * * *
4/8/96	—	MEMORANDUM by Christy Brzonkala in opposition to [32-1] motion to Dismiss Amended Complaint by James Landale Crawford (eh) [Entry date 04/08.96]
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
4/19/96	—	MEMORANDUM by Christy Brzonkala in opposition to [31-1] motion to Dismiss [16-1] Amended Complaint by Cornell D. Brown (eh) [Entry date 4/19/96]
	* * * * *	
4/26/96	—	MEMORANDUM by USA in support of the Constitutionality of the civil rights provision of the Violence Against Women Act of 1994 (eh) [Entry date 04/26/96]
	* * * * *	
5/1/96	42	MOTION to Intervene by USA In Order to Defend the Constitutionality of the Civil Rights Provision of the Violence Against Women Act of 1994 (eh) [Entry date 05/01/96]
	* * * * *	
5/6/96	44	ORDER granting [42-1] motion to Intervene by USA (signed by Chief Judge Jackson L. Kiser) (eh) [Entry date 05/06/96]

DATE	DOCKET NUMBER	PROCEEDINGS
	* * * * *	
5/7/96	46	MEMORANDUM OPINION (signed by Chief Judge Jackson L. Kiser) (eh) [Entry date 05/08/96]
5/7/96	47	ORDER granting [20-1] motion to Dismiss Plaintiff's Amended Complaint as to Landsidle, granting [3-1] motion to Dismiss (signed by Chief Judge Jackson L. Kiser) (eh) [Entry date 05/08/96]
	* * * * *	
6/3/96	53	MOTION to Voluntarily Dismiss Cornell D. Brown by Christy Brzonkala (eh) [Entry date 06/03/96]
	* * * * *	
6/4/96	55	NOTICE OF APPEAL by Christy Brzonkala. FILING FEE $105.00; RECEIPT # 74699; Order appealed: May 7, 1996 Order by Judge Kiser (jj) [Entry date 06/05/99]
	* * * * *	

DATE	DOCKET NUMBER	PROCEEDINGS
6/6/96	—	MEMORANDUM by Cornell D. Brown in opposition to [53-1] motion to Voluntarily Dismiss Cornell D. Brown by Christy Brzonkala (eh) [Entry date 06/07/96]
	* * * * *	
7/26/96	76	MEMORANDUM OPINION (signed by Chief Judge Jackson L. Kiser) (eh) [Entry date 07/29/96]
7/26/96	77	ORDER Dismissing w/prejudice claims against Antonio Morrison and James Crawford, Dismissing w/out prejudice state claims, and Dismissing case from the docket (signed by Chief Judge Jackson L. Kiser) (eh) [Entry date 07/29/96]
7/26/96	—	Case closed (eh) [Entry date 07/29/96]
	* * * * *	

DATE	DOCKET NUMBER	PROCEEDINGS
9/13/96	81	AMENDED NOTICE OF APPEAL by Christy Brzonkala. Order appealed: July 26, 1996 Order by Judge Kiser) (jj) [Entry date 09/13/96]
	* * * * *	
9/18/96	82	NOTICE OF APPEAL by USA. Order appealed: July 26, 1996 Order by Judge Kiser (jj) [Entry date 09/18/96]
	* * * * *	

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Roanoke Division

Civil Action No. 95-1358-R

CHRISTY BRZONKALA, PLAINTIFF

v.

VIRGINIA POLYTECHNIC INSTITUTE
AND STATE UNIVERSITY,
AND
ANTONIO J. MORRISON,
JAMES LANDALE CRAWFORD,
CORNELL D. BROWN,
AND
WILLIAM E. LANDSIDLE,
IN HIS CAPACITY AS COMPTROLLER OF
THE COMMONWEALTH, DEFENDANTS

AMENDED COMPLAINT

By leave of this Court pursuant to Federal Rule of Civil Procedure 15(a), plaintiff Christy Brzonkala, by counsel, amends her Complaint filed with this honorable Court on December 27, 1995 for declaratory judgment, injunctive relief and damages for violation of her civil rights under 20 U.S.C. sections 1681-88, also known as Title IX of the Education Amendments of 1972; for violation of her civil rights under 42 U.S.C. section 13981, also known as the Violence Against Women Act of 1994; for common law torts of assault, battery, false

imprisonment and *per se* defamation and for breach of contract under Virginia law.

JURISDICTION

1. Plaintiff invokes this Court's jurisdiction for her federal question claims under 28 U.S.C. section 1331 and under 42 U.S.C. section 13981(e)(3).

2. Plaintiff invokes this Court's jurisdiction over defendants Antonio J. Morrison, James Landale Crawford and Cornell D. Brown for her common law tort claims against them, individually, jointly and severally, under 28 U.S.C. section 1367(a). Plaintiff invokes this Court's jurisdiction over defendant James Landale Crawford under 28 U.S.C. section 1332 on the grounds that he is a citizen of Florida and that her claims against him exceed $50,000.00.

3. Plaintiff invokes this Court's jurisdiction over defendant Virginia Polytechnic Institute and State University for her state-law claim of breach of contract under 28 U.S.C. 1367(a) and under section 2.1-223.1 of the Code of Virginia (1995). Venue in the Roanoke Division is proper under Local Rule 18.

4. Plaintiff filed a charge with the United States Department of Education, Office of Civil Rights, Region III, pursuant to federal regulations governing Title IX; her charge was dismissed with leave to refile pending the outcome of this action. Plaintiff's claim of contract damages against defendant Virginia Polytechnic Institute and State University was formally rejected on October 25, 1995; she has subsequently delivered statutorily required notice of her contract claim to the Comptroller of the Commonwealth by

certified mail. Plaintiff has approved and is participating in a criminal investigation regarding her allegations about events which occurred on or about September 21-22, 1994 by the Virginia State Police. Plaintiff has exhausted her administrative remedies.

5. All counts pleaded herein are timely.

6. During a telephone conference on February 22, 1996, this Court announced that it would decline to stay plaintiff's causes of action against individual defendants, Antonio J. Morrison and James Landale Crawford, during an on-going State Police investigation and plaintiff was urged to amend and to add new parties with dispatch.

PARTIES

7. Plaintiff Christy Brzonkala is a never-married adult female United States citizen and a resident of Fairfax, Virginia. At the times complained about herein, plaintiff was a student at Virginia Polytechnic Institute and State University ("Virginia Tech") and was a beneficiary of Title IX of the Education Amendments of 1972. Prior to her arrival at Virginia Tech, plaintiff had been recruited by other Division I schools in the National Collegiate Athletic Association ("NCCA") to play basketball. Plaintiff selected Virginia Tech so that she could play her preferred sport, softball. Plaintiff was a "student athlete" and a non-scholarship prospect for Virginia Tech's varsity women's softball team.

8. Defendant Virginia Polytechnic and State University ("Virginia Tech") is a state supported institution of higher education incorporated under section 23-114 *et seq.* of the Code of Virginia (1995) and located in Blackburg, Virginia. Virginia Tech receives federal funds and is an institution covered by Title IX of the Education Amendments of 1972.

9. Defendant Antonio J. Morrison ("Morrison") is an adult unmarried male student of Virginia Tech and at the times complained about herein, he was a member of the school's football team on athletic scholarship. Morrison is a citizen of the Commonwealth of Virginia.

10. Defendant James Landale Crawford ("Crawford") is an adult unmarried male student of Virginia Tech and at the times complained about herein, he was a member of the school's football team on athletic scholarship. Crawford is a citizen of the state of Florida.

11. Defendant Cornell D. Brown ("Brown") is an adult male student of Virginia Tech and at the times complain[ed] about herein, he was a member of the school's football team on athletic scholarship. Brown is a citizen of the Commonwealth of Virginia.

12. Defendant William E. Landsidle is named as a defendant in his capacity as Comptroller of the Commonwealth for the sole purpose of complying with section 2.1-223.1 of the Code of Virginia (1995).

FACTS

13. On the night of September 21-22, 1994, plaintiff was sexually assaulted in a student room on the third floor of her own Virginia Tech dormitory by two men

whose acquaintance she had made in the company of another female student less than a half hour earlier and whose identities she knew only by given names and by their status as football team members. Approximately five months later, plaintiff learned the men were defendants Morrison and Crawford.

14. Plaintiff reported that she was not inebriated at the time of the assaults.

15. After her female companion and Crawford exited the room following fifteen minutes of conversation, Morrison immediately requested intercourse of plaintiff.

16. Plaintiff audibly told Morrison "no" twice.

17. When plaintiff rose to leave, Morrison forced her face-up onto a bed, pushed her down by her shoulders and disrobed her. Plaintiff does not recall crying out.

18. Morrison turned off the room light and forced plaintiff to submit to vaginal intercourse while he pinned her down by her elbows with his hands and pressed his knees against her legs. Plaintiff attempted to push Morrison off.

19. Before plaintiff could recover, Crawford came into the room and exchanged places with Morrison. Crawford forced plaintiff to submit to vaginal intercourse by pinning her down by her arms and placing his knees against her legs.

20. Again before plaintiff could recover, Morrison exchanged places with Crawford and Morrison forced plaintiff to submit to vaginal intercourse a third time.

21. Morrison did not use a condom to accomplish vaginal penetration of the plaintiff. Crawford did not use a condom to accomplish vaginal penetration of the plaintiff.

22. Morrison said to plaintiff at the conclusion of the third intercourse, "You better not have any fucking diseases."

23. After the third assault, Morrison clad only in his underwear followed wordlessly behind plaintiff until she reached her own dormitory suite on the second floor of the same building.

24. No one was awake in her dormitory suite at her arrival. Plaintiff bathed for a three to five hour period.

25. Approximately a month later, plaintiff confided in her roommate that she had been raped but she could not bring herself to provide any details.

26. After the assaults, plaintiff avoided contact with most fellow residents of her dormitory outside of her own room. Plaintiff radically altered her appearance by cutting her long hair.

27. In the weeks immediately following the assaults, plaintiff became depressed, stopped attending classes and attempted to commit suicide. Plaintiff was treated by a licensed psychiatrist at Virginia Tech and received anti-depressant medication.

28. No Virginia Tech employee attempted any more than a cursory inquiry into the source of plaintiff's mental distress.

29. Plaintiff eventually sought a retroactive withdrawal for the 1994/95 academic year.

30. In February 1995, plaintiff recognized Morrison and Crawford as the two men who forced her to submit to intercourse.

31. Prior to plaintiff's identification, Morrison announced publicly in the dormitory's dining hall and in the presence of Virginia Tech student Charlotte Wachter: "I like to get girls drunk and fuck the shit out of them."

32. At the end of April 1995, plaintiff filed a complaint against Morrison and Crawford under Virginia Tech's Sexual Assault Policy which was formally released for dissemination to students on July 1, 1994. See Exhibit A in Original Complaint, pages 26-28 of University Policies for Student Life, 1994-1995. Virginia Tech's judicial procedure is an "educational program or activity" within the plain meaning of Title IX of the Education Amendments of 1972.

33. Plaintiff relied on Virginia Tech officials to prosecute her complaints and, believing her failure to preserve physical evidence foreclosed them, she did not bring criminal charges against Morrison or Crawford.

34. At no time did any Virginia Tech employee urge plaintiff to reconsider her decision not to initiate a formal incident report or to reconsider her grounds for believing criminal charges would be futile.

35. At no time did any Virginia Tech employee report the assaults to Virginia Tech police or to Blackburg police.

36. No incident report was filed with any policing authority.

37. By information and belief, the only violent felony for which Virginia Tech authorities, once on notice that a crime may have been committed, decline to file incident reports either with Virginia Tech Police or with Blackburg Police is sexual assault where a female student has been victimized by a male Virginia Tech student.

38. By information and belief, the only violent felony for which Virginia Tech authorities, once on notice that crime may have been committed, defer to the victim's "wishes" about whether an incident report will be filed with Virginia Tech Police or Blackburg Police is sexual assault where a female student has been victimized by a male Virginia Tech student.

39. Under the Students' Right-to-Know provision of the Campus Security Act, all colleges and universities receiving federal funds are required to make public the number and nature of crimes involving students, both on their premises and off-campus, for which there are incident reports. 34 C.F.R. section 668.47 (final rule, April 29, 1994).

40. According to statistics presented annually in *The Chronicle of Higher Education*, Virginia Tech reported four rapes in 1992 and one rape in 1993.

41. By information and belief, between 1992 and 1993, thirteen rapes have been adjudicated at Virginia Tech through internal procedures with nine resulting in disciplinary action against the accused student.

42. After plaintiff filed her charge under the school's Sexual Assault Policy, she learned that a Virginia Tech student overheard an unidentified male Virginia Tech athlete advise defendant Crawford that he should have "killed the bitch."

43. The first hearing on July 21, 1995 was audio-taped by a Virginia Tech employee.

44. The Virginia Tech employee responsible for conducting the first hearing announced in his opening statement that charges were being brought against Morrison and Crawford under the school's "Abusive Conduct Policy" which included sexual assault.

45. This Court ordered Virginia Tech to turn over "copies" of the surviving audio-tapes to plaintiff's counsel by February 26, 1996.

46. Surviving audio-tapes of the first hearing, produced on February 26, 1996, are not complete. Plaintiff's cross-examination of Morrison and Crawford is missing as is some testimony of plaintiff's witnesses.

47. During the first hearing which lasted three hours, Morrison admitted that sexual contact had taken place between himself and plaintiff where and when she alleged.

48. During the first hearing and under questioning by plaintiff, Morrison admitted that plaintiff told him "No" twice.

49. During the first hearing, Crawford denied any sexual contact with plaintiff and offered Brown, the pair's suite-mate, as his alibi witness. Crawford testified that plaintiff was "really drunk" when she arrived in the room where Crawford confirmed Morrison had sexual contact with her.

50. During the first hearing, Brown testified that he was present in the dormitory suite during the same period in which plaintiff alleged the assaults took place and that he was close enough to the scene to observe the presence of plaintiff and Morrison together in Morrison's room.

51. Defendants Crawford and Brown testified that when Crawford left the presence of plaintiff and Morrison, he went to Brown's room in the same suite and after fifteen minutes, Crawford returned to his room in the company of Brown and entered it while plaintiff was still in the room.

52. During the first hearing, Virginia Tech student Hope Handley ("Handley") testified that she and plaintiff were in the dormitory room with Morrison and Crawford on the date and at the time plaintiff alleged

and that Handley had left first. Handley's testimony was also lost on produced audio-tapes.

53. The Virginia Tech judicial committee found insufficient evidence to take action against Crawford.

54. The Virginia Tech judicial committee found Morrison guilty of sexual assault and handed down punishment of immediate suspension from the school for two semesters.

55. In May 1995 Morrison appealed the Virginia Tech judicial committee's sanction. The sanction was upheld. See Exhibit B in Original Complaint, Letter to plaintiff from Cathyrn T. Goree, Ph.D dated May 22, 1995.

56. By the procedural rules set forth in Virginia Tech official publications, the decision of the appeals officer is final.

57. In the first week of July 1995, Virginia Tech officials Donna Lisker ("Lisker") and Cathyrn T. Goree ("Goree") called personally at plaintiff's home in Fairfax, a four hour drive from Blackburg, to advise her that:

(a) Morrison's attorney had threatened to sue the school on due process grounds;

(b) The school had deemed as having merit Morrison's "ex post facto" challenge, i.e., Morrison was charged under the Sexual Assault Policy, not yet spelled out in the Student Handbook;

(c) The school refused to defend in court the judicial panel's decision and the subsequent appeal decision; and

(d) A re-hearing under the Abusive Conduct Policy which pre-dated the Sexual Assault Policy was required.

58. To induce plaintiff's agreement to participate in a second hearing, Lisker and Goree assured plaintiff that plaintiff's story was believed by Virginia Tech officials and that the second hearing was a mere technicality to cure the school's error in bringing the original complaint under a policy not yet widely disseminated to students, namely the Sexual Assault Policy.

59. Counsel representing Virginia Tech, as members of the Office of the Attorney General, were on actual notice before 1995 that the due process arguments which defendant Morrison alleged were groundless under Virginia law. In particular Morrison's "ex post facto" challenge of the conduct provisions in the Student Handbook had already been judicially tested in a Virginia court by a college also represented by the Office of the Attorney General and the court found as a matter of law that a cause of action would not lie under any legal theory. See Exhibit 1, Letter Opinion, *Abrams v. Mary Washington College, et al.*, Circuit Court of the City of Fredericksburg, #CH93-193 (April 27, 1994) at 4.

60. Plaintiff was required to engage her own legal counsel at her own expense and she submitted to a second hearing by the Virginia Tech judicial committee

on July 21, 1995. See Exhibit C in Original Complaint, Letter to plaintiff from Gerard J. Kowalski and Joyce Williams-Green, dated August 4, 1995.

61. The second hearing was *de novo* and lasted seven hours. The second hearing was also audio-recorded and "copies" of surviving tapes were ordered by the Court to be turned over to plaintiff's counsel on February 26, 1996 under a protective order.

62. Preceding the second hearing, plaintiff and her attorney Harriet Dorsey of Blackburg, Virginia, were categorically denied access to the audio-tape recordings and other records of the first hearing while Morrison and his attorney, W. David Paxton of Roanoke, Virginia, were granted complete and early access.

63. Preceding the second hearing, plaintiff and her attorney were informed by Virginia Tech officials that all student testimony given in the first hearing would be accepted only by sworn affidavit. Notice was not sufficient to plaintiff to secure such documents from her witnesses who were away from school on summer break. Notice was sufficient to Morrison to procure sworn affidavits from his student witnesses including Crawford whose affidavit renewed his denials of sexual contact with plaintiff.

64. Plaintiff was forced to present a summary of her student witnesses' testimony through the testimony of Virginia Tech employee Lisker.

65. Preceding the second hearing, plaintiff was admonished by Virginia Tech officials through Lisker to avoid all mention of Crawford in her own testimony

because he had been dismissed from the process. Plaintiff was forced to give a truncated version of events in order to comply with Virginia Tech's demands. Crawford was present in the adjacent room during most of the second hearing.

66. Plaintiff and her attorney received no notice, written or oral, that the nature and particulars of the charge against Morrison were any different in the second hearing than in the first. Virginia Tech officials affirmed as late as December 5, 1995, that the charge against Morrison in the second hearing was "sexual assault." See Exhibit A, Plaintiff's Supplemental Memorandum in Opposition to Defendant Virginia Tech's Motion to Dismiss ("Plaintiff's Supplemental Memorandum"), "Dear Faculty, Staff, and Students" Memorandum by Peggy S. Meszaros, dated December 5, 1995 at paragraph 4.

67. The Virginia Tech judicial committee found Morrison guilty of abusive conduct and the sanction of an immediate two-semester suspension of Morrison was reimposed.

68. Morrison appealed the result of the second hearing. Without notice to plaintiff, the sanction against Morrison was set aside. See Exhibit D in Original Complaint, Letter to Mr. Antonio J. Morrison from Peggy S. Meszaros, Senior Vice-President and Provost, dated August 21, 1995.

69. On August 22, 1995, plaintiff learned for the first time from an article in *The Washington Post* that Morrison would return to the Virginia Tech campus for the Fall, 1995 semester. Upon information and belief,

Morrison returned to Virginia Tech on a full athletic scholarship.

70. After a syndicated newspaper article written by David Teel of the Newport News, Virginia *Daily Press* was published on November 30, 1995, plaintiff learned for the first time that the second judicial decision had actually found Morrison guilty of a reduced charge of "using abusive language." See Exhibit A, Plaintiff's Supplemental Memorandum, "Dear Faculty, Staff, and Students" Memorandum by Peggy S. Meszaros, dated December 5, 1995 at paragraph 6.

71. Upon information and belief, Head Football Coach Frank Beamer, through his subordinates, his agents and/or his representatives, participated directly and indirectly in the process by which the sanction against Morrison was overturned.

72. By information and belief, Virginia Tech officials coordinated a plan as early as May 1995 whereby Morrison would be allowed to rejoin the all-male football team for the beginning of the 1995 season.

73. By information and belief, Virginia Tech employees coordinated a plan as early as March 1995 whereby Brown's role in plaintiff's allegations would be obscured.

74. Solely because he is a member of Virginia Tech's all-male football team, Morrison was accorded affirmative advantages in the second hearing which were not accorded to plaintiff, who is a female.

75. Plaintiff was repeatedly and intentionally placed by Virginia Tech officials at a material disadvantage during the second hearing process because she is a female and because she is a victim of a specific type of sexual assault which, under Virginia common law, can only be alleged by a female against a male.

76. Because Morrison would be present on the Virginia Tech campus during the Fall, 1995 semester and because officials of Virginia Tech had repudiated her claim that Morrison had raped her before numerous students and athletes who were aware of the facts, plaintiff feared for her personal safety and canceled her plan to return to Virginia Tech for the Fall, 1995 semester. See paragraph 42 above. Plaintiff did not attend any other college or university during the Fall, 1995 term.

77. While Virginia Tech spontaneously refunded to plaintiff's parents her tuition for academic year 1994/95, no refund was offered for any other expenses plaintiff's family incurred including room, board, books and fees, or travel, telephone and legal expenses generated by the second hearing.

78. Plaintiff has suffered humiliation and embarrassment as a result of the second hearing and subsequent setting aside of the sanction against Morrison.

79. As a direct result of the unprotected sexual contact forced upon her on September 21-22, 1994, plaintiff has suffered and continues to suffer and will suffer in the future severe emotional distress for which she has received treatment from a licensed health care provider.

80. Morrison, through his attorney, has repeatedly published during 1995 and 1996 that plaintiff engaged in consensual intercourse with him.

81. Consensual intercourse between two persons who are not married to each other constitutes a crime called fornication, section 18.2-344 of the Code of Virginia (1995).

82. Morrison, through his attorney, has repeatedly published the allegation that plaintiff committed fornication under Virginia law with full knowledge that the statement-as-fact that plaintiff consented to sexual intercourse with him is false.

83. Morrison's statements through his attorney are motivated by express malice against plaintiff, who until November 30, 1995 was a private person.

84. Since December 5, 1995, through its spokesperson Larry Hincker, Virginia Tech has released to the media selected bits of testimony from the recorded testimony of both contested hearings while at the same time denying plaintiff and her present counsel access to such testimony.

FIRST CAUSE OF ACTION
VIOLATION OF RIGHTS UNDER TITLE IX–
DISPARATE TREATMENT GENDER
DISCRIMINATION–
AGAINST DEFENDANT VIRGINIA TECH

85. Plaintiff realleges paragraphs 1-84 above and incorporates them herein.

86. Defendant Virginia Tech treated plaintiff, as a female, differently from May 23, 1995 to August 22, 1995 than a similarly situated male student:

(a) Plaintiff and Morrison were both first year students at Virginia Tech in 1994/95;

(b) Plaintiff and Morrison resided in the same dormitory during 1994/95;

(c) Plaintiff and Morrison were both regarded as student athletes during 1994/95;

(d) Solely because he is a member of the school's all-male football team, Morrison received preferential treatment to the material detriment of plaintiff's education when:

(1) Virginia Tech intentionally violated its own rules which rendered the decision of an appeals officer final in judicial procedures;

(2) Virginia Tech intentionally induced plaintiff to agree to a second hearing on grounds which it knew were without merit;

(3) Virginia Tech intentionally hindered plaintiff's preparation for and participation in the second hearing by:

(A) giving her and her attorney shorter notice of the hearing date than the male and his attorney;

(B) giving the male and his attorney access to preparation materials to which she and her attorney were categorically denied;

(C) giving the male and his attorney earlier notice for the requirement for sworn affidavits than she received;

(D) requiring plaintiff to put forth evidence through hearsay-upon-hearsay testimony of a Virginia Tech employee while not requiring the male to do likewise;

(E) placing material limitations on plaintiff's testimony when no comparable limitations were placed on the male's testimony;

(F) failing to advise plaintiff and her attorney that other charges than "sexual assault" were at issue in the second hearing for which plaintiff bore the burden of proof and about which the male and his attorney were on advance notice;

(G) failing to meet Virginia Tech's obligations to plaintiff under the Family Education Right to Privacy Act ("FERPA," also known as the Buckley Amendment) to notify her of the outcome while at the same time, the school went to significant lengths to protect the male's FERPA rights.

(4) Since December 5, 1995 and in direct violation of FERPA's prohibition against a "pattern and practice" of revealing educational records without a student's written consent, Virginia Tech intentionally and repeatedly released to the media selected details of the two hearings, the records to which plaintiff and her present counsel laid claim as plaintiff's "educational records" and to which plaintiff and present counsel were denied access under their requests pursuant to Virginia's Freedom of Information Act and Virginia's Privacy Protection Act. These selected revelations were motivated by a malicious intent to bolster the credibility of the male student's denials and to attack the credibility of plaintiff's version of the facts even though Virginia Tech officials had found in favor of plaintiff's credibility in three separate fact-finding proceedings.

87. Plaintiff's education was materially diminished by the intentional discrimination against her by Virginia Tech.

88. Plaintiff suffered humiliation and embarrassment when it became known among student athletes that Morrison had been reinstated on full scholarship after the second hearing.

89. Plaintiff incurred actual losses in legal fees, travel expenses, long distance telephone charges and for medical attention in preparation for the second hearing.

SECOND CAUSE OF ACTION

VIOLATION OF CIVIL RIGHTS UNDER TITLE IX – DISPARATE IMPACT GENDER DISCRIMINATION – AGAINST DEFENDANT VIRGINIA TECH

90. Plaintiff realleges paragraphs 1-89 and incorporates them herein.

91. Defendant Virginia Tech's policy of allowing the victim to decide whether an incident report will be filed with Virginia Tech Police or with Blacksburg Police constitutes disparate impact gender discrimination against female Virginia Tech students, including plaintiff, which is forbidden by Title IX of the Education Amendments of 1972 because:

(a) Virginia Tech automatically files incident reports of violent felonious crime regardless of the victim's preferences in every other type of crime except where a female student has been sexually victimized by a male Virginia Tech student;

(b) Virginia Tech automatically complies with obligations imposed by federal law, namely the Students' Right to Know Act, for all categories of crime except where a female student has been sexually victimized by a male Virginia Tech student;

(c) Virginia Tech encourages student confidence in the Blacksburg criminal justice system for all categories of criminal victimization except where a female student has been sexually victimized by a male Virginia Tech student;

(d) Virginia Tech accurately educates students with respect to their rights under Virginia law in all situations except where a female student has been sexually victimized by a male Virginia Tech student;

(e) Different treatment of female students' complaints of criminal sexual assault proximately causes a community attitude trivializing sexual assault and discouraging reporting;

(f) Low reporting of sexual assault proximately causes actual and perceived increases in an atmosphere of danger for females and thus, diminishes their educational experience below reasonable expectations of similarly situated male students.

92. Plaintiff, as a female Virginia Tech student, suffered diminishment of her education as a direct result of the school's gender discriminatory crime reporting policy and her criminal claims against Morrison and Crawford were unfairly compromised by delay of investigation to the advantage of two male Virginia Tech students.

THIRD CAUSE OF ACTION
BREACH OF CONTRACT AGAINST
DEFENDANT VIRGINIA TECH

93. Plaintiff realleges paragraph 1-92 and incorporates them herein.

94. Plaintiff and defendant Virginia Tech were parties to a bona fide contract, offered and accepted, containing certain bargained for provisions designed to regulate student life while plaintiff was in residence at Virginia Tech. The terms of this contract are memorialized in a publication called *University Policies for Student Life, 1994-95*, revised July 1, 1994, and explained in other official Virginia Tech documents including a publication called *A Practical Guide to the Virginia Tech Judicial System*, issued through the Division of Student Affairs. *Ross* v. *Creighton University*, 957 F.2d 410, 417 (7th Cir. 1992) (Student Handbook and policies create enforceable contract).

95. At page 6, *A Practical Guide to the Virginia Tech Judicial System* states without equivocation that an "Appeal Officer's decision is final."

96. Plaintiff detrimentally relied on the identifiable contract and the identifiable contractual promise of finality for the appeal officer's decision in the first hearing.

97. Virginia Tech induced plaintiff by intentional and over-reaching misrepresentations to accept a breach of the terms of her express contract, including false and misleading communications that:

(a) Morrison's challenge of the first hearing was legally credible;

(b) Virginia Tech officials continued to believe plaintiff's story and wished only to cure the school's own error in the record; and

(c) Charges against Morrison in the second hearing would be the same as in the first; and

(d) Virginia Tech was unwilling to defend the decision of the first hearing in court under any circumstances because it feared the school might not prevail.

98. Virginia Tech as the drafter of the contract document bears a heightened responsibility to avoid over-reaching. The vast authority of Virginia Tech over a student's affairs likewise requires the school to forbear over-reaching.

99. Under Virginia law, the terms of the contract must be construed against the drafter, Virginia Tech, and in plaintiff's favor.

100. As a result of Virginia Tech's breach of contract, plaintiff has suffered actual losses arising from the second hearing, including legal fees, travel expenses, long distance telephone charges and medical attention associated with her physical distress in returning to Blacksburg and undergoing a seven hour hearing with virtually no breaks.

101. Virginia Tech, by over-reaching and deliberate misrepresentation, failed to honor an identifiable contractual promise contained in an identifiable contract and thus, is liable for plaintiff's actual losses resulting from its breach of contract.

DAMAGES DEMANDED FROM VIRGINIA TECH

102. WHEREFORE, plaintiff demands from Defendant Virginia Tech on all Counts:

(a) Declaratory judgment that the second hearing and appeal are null and void;

(b) An injunction forbidding Virginia Tech from prosecuting internally any future complaint of sexual assault rising to a felony for which it has not prepared and filed an incident report according to state and/or federal law;

(c) An injunction directing Virginia Tech officials to comply with the letter and the spirit of the Campus Security Act of 1990, namely, the reporting provisions of the Students' Right to Know Act;

(d) An injunction directing Virginia Tech officials to begin a one-year review by a presidentially appointed "Blue Ribbon" Task Force of students, faculty, alumni and concerned citizens, of its Sexual Assault Policy and accompanying procedures in the light of the Governor's Task Force on Substance Abuse and Sexual Assault on Campus (1992) and in the light of the Sexual Assault Victims' Bill of Rights in the amended Campus Security Act, P.L. 102-325 (1992), and to publish a report of their

findings and recommendations in the *Collegiate Times*, Virginia Tech's student newspaper, during orientation week for academic year 1997/98;

(e) An injunction directing Virginia Tech to provide at least five hours of mandatory sexual assault awareness education to all students athletes in their first month of residence on Virginia Tech's campus and to bring nationally recognized speakers on sexual harassment and sexual assault issues to its university forum at least twice a year until academic year 2000/2001;

(f) An award of such compensatory damages for loss of education, expenses arising from the second hearing, medical and psychological treatment past and future, humiliation and embarrassment, loss of earnings due to delayed graduation as may be proven at trial and pre-judgment interest dating from May 22, 1995;

(g) Such punitive damages for her federal claims as a jury may award and this Court may approve;

(h) Reasonable attorneys fees and non-taxable costs for her federal claims under 42 U.S.C. section 1988;

(i) Taxable costs of this action; and

(j) Such other relief as this Court may deem proper.

FOURTH CAUSE OF ACTION
VIOLATION OF CIVIL RIGHTS
UNDER VIOLENCE AGAINST WOMEN ACT OF 1994
AGAINST DEFENDANTS MORRISON,
CRAWFORD & BROWN

103. Plaintiff realleges paragraphs 1-102 and incorporates them herein.

104. Morrison twice forced sexual intercourse upon plaintiff, who is not his spouse, against plaintiff's will, by force, threat and intimidation and through the use of plaintiff's mental incapacity and physical helplessness in violation of Section 18.2-61 of the Code of Virginia (1994) which defines such acts as felonies.

105. Morrison twice forced physical contact upon plaintiff of a nature intended to create sexual arousal and he accomplished this contact by force and intimidation in violation of Section 18.2-67.3(A)(2)(b) of the Code of Virginia (1994) which defines such acts as felonies.

106. Crawford forced sexual intercourse upon plaintiff, who is not his spouse, against plaintiff's will, by force, threat and intimidation and through the use of plaintiff's mental incapacity and physical helplessness in violation of Section 18.2-61 of the Code of Virginia (1994) which defines such act as a felony.

107. Crawford forced physical contact upon plaintiff of a nature intended to create sexual arousal and he accomplished this contact by force and intimidation in violation of Section 18.2-67.3(A)(2) of the Code of Virginia (1994) which defines such acts as felonies.

108. By his admitted physical presence at the place, date and time upon which plaintiff alleges she was raped repeatedly and subjected to aggravated sexual battery, and by his failure to intervene to prevent a crime, Brown was a principal in the second degree, within the meaning of Section 18.2-18 of the Code of Virginia (1994), to the felonies committed by Morrison and Crawford against the plaintiff. By information and belief, Brown offered aid and encouragement to Morrison and Crawford during the commission of a crime and his acts manifest a discriminatory animus toward plaintiff's gender.

109. Defendants Morrison, Crawford and Brown conspired, confederated and combined with each other, within this Commonwealth, to commit felonies described in paragraphs 104-108 above in violation of Section 18.2-22 of the Code of Virginia (1994) which defines such conspiracy as a felony.

110. Under Section 18.2-67.6 of the Code of Virginia (1994), plaintiff was not required to cry out or to physically resist Morrison and Crawford in order to bring forth allegations of felonious rape.

111. The violent acts against the plaintiff described in paragraphs 104-108 above were motivated wholly by discriminatory animus toward her gender and were not random acts of violence. See paragraph 31 above.

112. Failure to use a condom by Morrison to accomplish vaginal penetration of plaintiff manifests further Morrison's willful, wanton and reckless disregard for plaintiff's safety and constitutes extreme and outrageous behavior which shocks the conscience of

reasonable persons and manifests a discriminatory animus toward plaintiff's gender.

113. Failure to use a condom by Crawford to accomplish vaginal penetration of plaintiff manifests further Crawford's willful, wanton and reckless disregard for plaintiff's safety and constitutes extreme and outrageous behavior which shocks the conscience of reasonable persons and manifests a discriminatory animus toward plaintiff's gender.

114. As a direct result of the acts of Morrison, Crawford and Brown, plaintiff suffered, now suffers and will continue to suffer physical and psychological injuries and severe emotional distress for which she has sought treatment from a licensed health care provider.

DAMAGES DEMANDED UNDER FEDERAL LAW AGAINST DEFENDANTS MORRISON, CRAWFORD & BROWN

115. WHEREFORE, plaintiff demands of defendants Morrison, Crawford and Brown, jointly and severally, under 42 U.S.C. Section 13981 (Pub. L. 103-322, Title IV, Section 40302, Sept. 13, 1994, 108 Stat. 1941):

(a) Such compensatory damages as may be proven at trial and pre-judgment interest dating from September 22, 1994;

(b) Such punitive damages as a jury may award and this Court may approve;

(c) Reasonable attorneys fees and non-taxable costs of this action under 42 U.S.C. section 1988;

(d) Taxable costs of this action; and

(e) Such other relief as this Court may deem proper.

FIFTH CAUSE OF ACTION
COMMON LAW ASSAULT AND BATTERY
AGAINST DEFENDANTS MORRISON & CRAWFORD

116. Plaintiff realleges paragraph 1-115 and incorporates them herein.

117. Defendant Morrison forced a touching of plaintiff's person which was offensive to plaintiff and would be offensive to a reasonable person in similar circumstances.

118. Morrison accomplished offensive touching of plaintiff's person without her concent.

119. Morrison placed plaintiff in fear of imminent offensive touching without her consent.

120. Plaintiff suffered damages as a direct result of Morrison's offensive touching of her including humiliation, embarrassment, severe emotional distress, anxiety, depression, medical and psychological expenses, travel expenses and loss of earning capacity and she will continue to suffer these damages in the future.

121. Defendant Crawford forced a touching of plaintiff's person which was offensive to plaintiff and would be offensive to a reasonable person in similar circumstances.

121. [*sic*] Crawford accomplished offensive touching of plaintiff's person without her consent.

122. Crawford placed plaintiff in fear of imminent offensive touching without her consent.

123. Plaintiff has suffered, suffers now and will continue to suffer in the future damages as a direct result of defendant Crawford's offensive touching of her including humiliation, embarrassment, severe emotional distress, anxiety, depression, medical and psychological expenses, travel expenses and loss of earning capacity.

124. Morrison and Crawford combined, conspired, aided and abetted each other in the accomplishment of their separate offensive touchings of plaintiff.

125. Morrison and Crawford are jointly and severally liable for plaintiff's damages.

SIXTH CAUSE OF ACTION COMMON LAW FALSE IMPRISONMENT AGAINST DEFENDANTS MORRISON, CRAWFORD & BROWN

126. Plaintiff realleges paragraphs 1-125 and incorporates them herein.

127. Morrison confined plaintiff to a closed space with her awareness but without her consent.

128. Crawford confined plaintiff to a closed space with her awareness but without her consent.

129. Morrison, Crawford and Brown conspired and combined, aided and abetted each other in the act of confining plaintiff to a closed space without her consent.

130. Morrison, Crawford and Brown are jointly and severally liable for damages caused to plaintiff as a result of false imprisonment.

131. As a direct result of the false imprisonment inflicted by defendants Morrison, Crawford and Brown, plaintiff has suffered, now suffers and will continue to suffer in the future damages from physical injury to her person, humiliation, embarrassment, severe emotional distress, anxiety, depression, medical and psychological expenses, travel expenses, and loss of earning capacity.

DAMAGES DEMANDED UNDER COMMON LAW AGAINST DEFENDANTS MORRISON, CRAWFORD & BROWN

132. WHEREFORE, plaintiff demands of defendants Morrison, Crawford and Brown, jointly and severally, for her common law tort injuries:

(a) Such compensatory damages as shall be proven at trial plus pre-judgment interest dating from September 22, 1994;

(b) Such punitive damages as the jury may award and the Court may approve; and

(c) Such other relief as may be deemed just and proper.

SEVENTH CAUSE OF ACTION
PER SE DEFAMATION
AGAINST DEFENDANT MORRISON

133. Plaintiff realleges paragraphs 1-132 and incorporates them herein.

134. In the Commonwealth of Virginia, sexual intercourse between two persons who are not married to each is deemed "fornication" which is a crime of moral turpitude in Virginia. Sections 18.2-344 and 18.2-9(2)(d) of the Code of Virginia (1995).

135. After March 2, 1995, defendant Morrison told Virginia Tech employees that plaintiff engaged in consensual sexual intercourse with him, an act which is a crime of moral turpitude in Virginia.

136. As recently as February 18, 1996, defendant Morrison, through his attorney, published to persons outside any relevant sphere of privilege, absolute or qualified, that plaintiff engaged in consensual sexual intercourse with Morrison, an act which is a crime of moral turpitude in Virginia.

137. The exact words of Morrison, and his attorney, were that sexual intercourse between Morrison and plaintiff was "consensual."

138. Morrison's attorney is his agent. Morrison's attorney published the statement that plaintiff had engaged in "consensual" intercourse with plaintiff with the express authorization and ratification of Morrison.

139. Morrison knew the statement to be false that plaintiff had committed fornication. Morrison's attorney, acting as his agent, knew the statement to be false that plaintiff had committed fornication, or with the exercise of reasonable inquiry, should have so known.

140. Morrison, and his attorney acting as his agent, defamed plaintiff out of malice.

141. Neither Morrison or his attorney enjoys any legal privilege to defame plaintiff.

142. Because Morrison volunteered his own guilt in an act of fornication, under the rule of *Zysk* v. *Zysk*, 239 Va. 32, 404 S.E.2d 721 (1990), he is barred from seeking civil redress in Virginia courts for any damages he personally may have suffered as a result of that criminal act.

143. As a direct result of *per se* defamation by Morrison, and his attorney acting as is agent, plaintiff has suffered humiliation, embarrassment and loss of her good name and diminishment of her credibility.

DAMAGES DEMANDED EXCLUSIVELY
AGAINST DEFENDANT MORRISON

144. WHEREFORE, plaintiff demands of Defendant Morrison:

(a) Compensatory damages for the injury to her good name and credibility in the amount of $10,000,000.00 with pre-judgment interest dating from February 19, 1996.

(b) Such punitive damages as the jury may award and the court may approve; and

(c) Such other relief as may be deemed just and proper.

TRIAL BY JURY ON ALL COUNTS IS DEMANDED.

Respectfully submitted,

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Nos. 99-5; 99-29

In the Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,
v.
ANTONIO J. MORRISON, *et al.*,
Respondents,

CHRISTY BRZONKALA,
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v.
ANTONIO J. MORRISON, *et al.*,
Respondents.

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On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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QUESTIONS PRESENTED

1. Whether Congress acted within the scope of its Commerce Clause authority when it enacted 42 U.S.C. § 13981 (the "VAWA Civil Rights Remedy"), the provision of the Violence Against Women Act that creates a supplemental private right of action for victims of gender-motivated violence, based on extensively documented findings that discriminatory violence creates significant barriers to participation by women in interstate commerce?

2. Whether Congress' enactment of the VAWA Civil Rights Remedy (42 U.S.C. § 13981) was a permissible exercise of its authority under Section Five of the Fourteenth Amendment?

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IN THE

Supreme Court of the United States

Nos. 99-5; 99-29

UNITED STATES OF AMERICA,
Petitioner,

v.

ANTONIO J. MORRISON, ET AL.,
Respondents,

CHRISTY BRZONKALA,
Petitioner,

v.

ANTONIO J. MORRISON, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF PETITIONER CHRISTY BRZONKALA

OPINIONS BELOW

The opinions of the court of appeals are reported at 169 F.3d 820 (4th Cir. 1999) (*en banc*) and 132 F.3d 949 (4th Cir. 1997), and are reproduced in the Appendix accompanying the Petition of the United States in this case ("App.") at 1a and at 282a. The opinion of the district court is reported at 935 F. Supp. 779 (W.D. Va. 1996) and is reproduced at 350a.

STATEMENT OF JURISDICTION

The first decision of the United States Court of Appeals for the Fourth Circuit was entered on December 23, 1997, and was vacated on February 5, 1998. The *en banc* court of appeals decision was entered March 5, 1999. The Court extended the time for filing the Petition for Certiorari until June 30, 1999. The United States intervened in the proceedings below. The Court granted the Petition for Certiorari on September 28, 1999. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. I, § 8, cls. 3, 18; U.S. Const. amend. XIV; 42 U.S.C. § 13981; 28 U.S.C. § 1445(d).[1]

STATEMENT OF THE CASE

A. Factual Background

Christy Brzonkala ("Brzonkala") brought this case under the Civil Rights Remedy of the Violence Against Women Act of 1994, Pub. L. No. 103-322, § 40302, 108 Stat. 1902, 1941 (codified at 42 U.S.C. §13981) (the "Civil Rights Remedy"), against respondents Antonio Morrison ("Morrison") and James Crawford ("Crawford"). The two respondents took turns raping the eighteen-year-old Brzonkala in September 1994, just after she enrolled as a freshman at Virginia Polytechnic Institute ("Virginia Tech"), a state-funded institution. At the time of the gang rape, which occurred in Brzonkala's own college dormitory, respondents Morrison and Crawford were also enrolled at Virginia Tech and both were members of its varsity football team. J.A. 15 (Am. Comp., ¶¶ 9, 10).

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[1] The text of the pertinent constitutional and statutory provisions are reproduced in Appendix A to this brief.

Thirty minutes after Brzonkala first met Morrison and Crawford, Morrison pushed her down by her shoulders on a dormitory bed, disrobed her, and forced her to submit to vaginal intercourse while he pinned her with his hands and pressed his knees against her legs. J.A. 15-16 (Am. Comp., ¶¶ 13, 17, 18). When Morrison had finished raping Brzonkala, Crawford exchanged places with Morrison. Crawford forced Brzonkala to submit to vaginal intercourse a second time by again pinning her arms down and placing his knees against her legs. *Id.* at 16 (Am. Comp., ¶ 19). Finally, Morrison and Crawford changed places yet again and Morrison forced Brzonkala to submit to unwanted vaginal intercourse a third time. *Id.* at 17 (Am. Comp., ¶ 20).

Neither Morrison nor Crawford used condoms while repeatedly raping Brzonkala. J.A. 17 (Am. Comp., ¶ 21). After the third rape, however, Morrison threatened Brzonkala by stating "you better not have any fucking diseases." *Id.* (Am. Comp., ¶ 22). When Morrison and Crawford finally released Brzonkala, Morrison continued his assaultive and menacing conduct by silently stalking Brzonkala, following her until she reached her own dormitory room. *Id.* (Am. Comp., ¶ 23).

In the months following the gang rape, Morrison announced publicly in the dormitory dining hall that he "like[d] to get girls drunk and fuck the shit out of them." J.A. 18 (Am. Comp., ¶ 31). Morrison and Crawford received support for their violent behavior towards women from other male athletes at Virginia Tech. For example, after Brzonkala filed a complaint with the school against Morrison and Crawford alleging a violation of Virginia Tech's sexual assault policy, she learned that another male student athlete had been overheard telling Crawford that he should have "killed the bitch." *Id.* at 20 (Am. Comp., ¶ 42).

The sexual assaults by Morrison and Crawford ended Brzonkala's education at Virginia Tech, thereby limiting her career opportunities and earning potential. Brzonkala was a tuition-paying student at Virginia Tech. After the gang rape, she became depressed and withdrawn, stopped attending classes and attempted to commit suicide. Although Brzonkala sought treatment by a psychiatrist and received anti-depressant medication, the rape rendered her unable to function as a college student and she sought a retroactive withdrawal from Virginia Tech for the 1994-95 academic year. J.A. 17-18 (Am. Comp., ¶¶ 26, 27, 29).

In early 1995, Brzonkala filed a complaint with Virginia Tech against Morrison and Crawford under the school's sexual assault policy. J.A. 18 (Am. Comp., ¶ 32). During the hearing on Brzonkala's complaint before the Virginia Tech Judicial Committee, Morrison confessed that he had sexual contact with Brzonkala notwithstanding that she had twice told him "no." *Id.* at 21 (Am. Comp., ¶¶ 47, 48). The Judicial Committee found insufficient evidence to punish Crawford, but found Morrison guilty of sexual assault and sentenced him to immediate suspension for two semesters. *Id.* at 22 (Am. Comp., ¶¶ 53, 54). In May 1995, following an appeal by Morrison, the Virginia Tech appeals officer upheld the Judicial Committee's sentence. *Id.* (Am. Comp., ¶ 55).

Subsequently, in July 1995, Virginia Tech officials advised Brzonkala that Morrison planned to challenge his conviction under the sexual assault policy, and that Virginia Tech would not defend in court the Judicial Committee's decision to suspend Morrison for two semesters. She was informed that Virginia Tech instead intended to hold a re-hearing to revisit its determination of the football players' culpability. J.A. 22-23 (Am. Comp., ¶ 57). Brzonkala was nonetheless assured by school officials that they believed her account of the gang rape and that the second hearing was nothing more than a

technicality, designed to cure Virginia Tech's error in bringing the original complaint under the school's sexual assault policy, which had not yet been widely distributed to students. *Id.* at 23 (Am. Comp., ¶ 58).

Brzonkala was thus required to return to Virginia Tech for a second hearing before the Judicial Committee and to engage and pay for her own legal counsel to represent her in that hearing. J.A. 23-24 (Am. Comp., ¶ 60). In preparation for the hearing, Morrison was permitted complete access to the transcript and exhibits from the initial hearing, while Brzonkala was denied any access to these crucial materials. *Id.* at 24 (Am. Comp., ¶ 62). In addition, Morrison was given advance notice sufficient to allow him to procure sworn affidavits from student witnesses who testified at the first hearing. Brzonkala was given no such notice, which effectively barred her from submitting the student testimony she sought to introduce. *Id.* (Am. Comp., ¶ 63).

Although the Judicial Committee informed Brzonkala that the second hearing constituted a *de novo* consideration of the gang rape allegations, she was instructed to avoid any mention of Crawford in her own testimony because the claim against him had been dismissed in the original proceeding (under the sexual assault policy that Virginia Tech subsequently deemed inapplicable). In order to comply with the Judicial Committee's mandate, Brzonkala was forced to give incomplete and diluted testimony about the gang rape that excluded Crawford's central role in sexually assaulting her. Notwithstanding Virginia Tech's instructions to Brzonkala that Crawford's conduct and role would not be considered, Crawford himself received notice of the second hearing and was present in an adjacent room during the proceeding.[2] J.A. 24-25 (Am. Comp., ¶ 65).

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[2] Crawford was later indicted on charges of rape and attempted sodomy in connection with the 1996 gang rape of another female Virginia Tech student. *See Virginia* v. *James L. Crawford*, Conviction and Sentencing

The Judicial Committee again found Morrison guilty and sentenced him to the same two-semester suspension. J.A. 25 (Am. Comp., ¶ 67). Inexplicably, Morrison's count of conviction was changed from "sexual assault" to "using abusive language." Morrison appealed. On August 21, 1995, without any notice to Brzonkala, Virginia Tech set aside Morrison's punishment. *Id.* at 25-26 (Am. Comp., ¶¶ 68, 70). On August 22, 1995, Brzonkala learned through reading the newspaper that Morrison would return to Virginia Tech for the Fall 1995 semester, apparently on a full athletic scholarship. *Id.* (Am. Comp., ¶ 69).

After learning that Morrison was permitted to enroll at Virginia Tech for the Fall 1995 semester, and because of the way Virginia Tech officials had repudiated her complaint, Brzonkala feared for her personal safety and canceled her plans to return to school at Virginia Tech for the Fall 1995 semester. Brzonkala did not attend any other college or university during the Fall 1995 term. J.A. 27 (Am. Comp., ¶ 76). While Virginia Tech refunded Brzonkala's tuition for the 1994-95 academic year, she did not receive a refund of monies that she paid for her room, board, books and fees, nor compensation for the legal and travel expenses associated with the second hearing. *Id.* (Am. Comp., ¶ 77).

B. Statutory Background

The Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (codified in scattered sections of 18 U.S.C. and 42 U.S.C.) ("VAWA") was the product of more than four years of congressional deliberation, including nine

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Order (Sept. 5, 1997) (Montgomery County, Va.) (Circuit Court) (certified copy lodged with Clerk of Court). Crawford pleaded guilty to the lesser charge of attempted aggravated sexual assault, and was sentenced to twelve months in prison. *Id.* The sentencing court suspended the entire prison sentence and placed Crawford on "unsupervised probation." *Id.* at 2.

hearings with more than 100 witnesses submitting testimony.[3] Through these proceedings, Congress exhaustively explored the problem of violence against women -- a problem that Congress termed "a national tragedy played out every day in the lives of millions of American women at home, in the workplace, and on the street." S. Rep. No. 102-197, at 39 (1991) ("1991 S. Rep."). One of VAWA's key components is the "Civil Rights Remedies for Gender-Motivated Violence Act," 42 U.S.C. §13981 (the "Civil Rights Remedy"), under which Christy Brzonkala's claim arises.[4] This provision was the product of a bi-partisan effort to address the issue of gender-motivated violence. S. Rep. No. 103-138, at 40 (1993) ("1993 S. Rep."). The Civil Rights Remedy declares that "[a]ll persons within the United States shall have the right to be free from crimes of violence motivated by gender," 42 U.S.C. § 13981(b), and creates a private cause of action against any "person . . . who commits a crime of violence motivated by gender." *Id.* §13981(c).[5] Congress established the Civil Rights Remedy

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[3]Where, as here, a federal statute is the product of several years of congressional consideration, this Court considers the entire legislative record in evaluating the legislative findings. *See, e.g., Hodel* v. *Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 278-80 & n.19 (1981) (relying on legislative record compiled over six years).

[4]In addition to the Civil Rights Remedy, VAWA funded state training programs to improve law enforcement's response to domestic violence and sexual assault, supported social service programs to local communities assisting victims, and enacted federal felonies to address interstate violence. Only the Civil Rights Remedy is at issue here. The interstate violence felonies have been uniformly upheld against constitutional challenge. *See, e.g., United States* v. *Gluzman*, 154 F.3d 49, 50-51 (2d Cir. 1998), *cert. denied*, 119 S. Ct. 1257 (1999) (18 U.S.C. § 2261).

[5] A "crime of violence" is defined as an act or acts that would constitute a felony under existing federal or state law, "whether or not those acts have actually resulted in criminal charges, prosecution, or conviction." *Id.* § 13981(d)(2). A crime is "motivated by gender" if it is "committed because

> to protect the civil rights of victims of gender motivated violence and to promote public safety, health, and activities affecting interstate commerce by establishing a Federal civil rights cause of action for victims of crimes of violence motivated by gender.

Id. § 13981(a).

In examining the national problem of violence against women, Congress thoroughly investigated and extensively documented the effects of gender-motivated violence and state and local responses. Congress concluded that "crimes of violence motivated by gender have a substantial adverse effect on interstate commerce." H.R. Conf. Rep. No. 103-711, at 385 (1994) ("1994 Conf. Rep."). See also 1993 S. Rep. 42, 54; 1991 S. Rep. 43-48, 53. Further, Congress found that "existing bias and discrimination in the criminal justice system often deprives victims of crimes of violence motivated by gender of equal protection of the laws and the redress of the laws to which they are entitled." 1994 Conf. Rep. 385. Of particular concern was "the underlying attitude that . . . violence [against women] is somehow less serious than other crime." 1993 S. Rep. 38; see also Majority Staff of Senate Comm. on the Judiciary, 103d Cong., 1st Sess., *The Response to Rape: Detours on the Road to Equal Justice* 1-2 (Comm. Print 1993) ("Maj. Staff Rep.").

Before reaching its final form, the Civil Rights Remedy was honed through the legislative process. Addressing concerns raised by the Conference of Chief Justices and the Judicial Conference of the United States, Congress expressly limited the Civil Rights Remedy so that it would reach only conduct that

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of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender." *Id.* § 13981(d)(1). The Civil Rights Remedy permits recovery of both compensatory and punitive damages and other forms of relief. *Id.* § 13981(c). Although gender-motivated violence disproportionately affects women, the law is drafted in gender-neutral terms. *Id.* § 13981; *see* 1993 S. Rep. 37-38.

was already unlawful, would not interfere with the enforcement of existing state criminal and civil laws, and would preserve a proper role for state courts.[6] The Remedy excludes any cause of action for "random acts of violence unrelated to gender or for acts that cannot be demonstrated, by a preponderance of the evidence, to be motivated by gender." 42 U.S.C. § 13981(e)(1). It further prohibits federal courts from asserting supplemental jurisdiction over claims for divorce, alimony, equitable distribution of marital property, or child custody decrees, *id.* § 13981(e)(4); permits Civil Rights Remedy claims to be brought in either federal or state court, *id.* § 13981(e)(3); and prohibits removal of actions filed in state court. 28 U.S.C. § 1445(d). As Senator Hatch explained, the Civil Rights Remedy "take[s] into consideration the role of the Federal Government versus the role [of] the State[s]." *Violent Crimes Against Women: Hearing Before the Senate Comm. on the Judiciary*, 103d Cong. 81 (1993) (S. Hearing No. 103-726, Apr. 13, 1993) ("Apr. 1993 S. Hearing").

Congress made extensive legislative findings concerning the substantial effects of gender-motivated violence on interstate commerce and the states' continued inability fully to address discriminatory responses to gender-motivated violence by state and local justice systems. Because the legislative record is massive, space limitations permit only a brief overview of

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[6] After Congress made these changes, the Judicial Conference withdrew its opposition. *Crimes of Violence Motivated by Gender: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 103d Cong. 70-71 (1993) ("1993 H. Hearing"). (Letter from Stanley Marcus, Chairman, Ad Hoc Committee on Gender-Based Violence). The National Association of Women Judges consistently endorsed VAWA, including the Civil Rights Remedy, beginning in 1992. *Id.* at 30-32.

Congress' findings and the voluminous evidence supporting them.[7]

The Substantial Effects of Gender-Based Violence on Interstate Commerce:

Congress explicitly concluded that gender-motivated violence has pervasive effects on interstate commerce:

> by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved, in interstate commerce; . . . by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products; a Federal civil rights action . . . is necessary . . . to reduce the substantial adverse effects on interstate commerce caused by crimes of violence motivated by gender . . . .

1994 Conf. Rep. 385. *Accord* 1993 S. Rep. 54 ("Gender-based crimes and the fear of gender-based crimes restricts movement, reduces employment opportunities, increases health expenditures, and reduces consumer spending, all of which affect interstate commerce and the national economy."); 1991 S. Rep. 53.

Congress concluded that gender-motivated violence affects interstate commerce by serving as a substantial barrier to women's employment opportunities and other economic activities, finding that:

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[7] *See* Appendix B, submitted with this Brief (listing hearings and witnesses). For a more detailed description of the legislative history, *see* Brief of Senator Joseph R. Biden, Jr. as *Amicus Curiae* in Support of Petitioners.

> Gender-based violence bars its most likely targets -- women -- from full participation in the national economy. For example, studies report that almost 50 percent of rape victims lose their jobs or are forced to quit because of the crime's severity. Even the fear of gender-based violence affects the economy because it deters women from taking jobs in certain areas or at certain hours that pose a significant risk of such violence.

Id. (footnote omitted); 1994 Conf. Rep. 385. Congress specifically found that women justifiably "refuse higher paying night jobs in service/retail industries because of the fear of attack," noting that homicide is the leading cause of women's death at work. 1993 S. Rep. 54 n.70. See also 1991 S. Rep. 38 ("nearly 50 percent [of women] do not use public transit alone after dark" for fear of rape); *id.* (fear of violence "takes a substantial toll on the lives of all women," for example, "in lost work"); S. Rep. No. 101-545, at 33, 37 (1990) ("1990 S. Rep.") (gender-motivated violence causes "lost careers, decreased productivity" and "takes its toll in employee absenteeism and sick time for women who either cannot leave their homes or are afraid to show the physical effects of the violence"); *Violence Against Women: Victims of the System: Hearing Before the Senate Comm. on the Judiciary*, 102d Cong. 240 (1991) ("1991 S. Hearing") (testimony of National Federation of Business and Professional Women) (noting that harassment by batterers reduces battered women's ability to maintain or secure employment); *Hearing on Domestic Violence: Hearing Before the Senate Comm. on the Judiciary*, 103d Cong. 17-18 (1993) (S. Hearing No. 103-596, Feb. 1, 1993) ("Feb. 1993 S. Hearing") (statement of James Hardeman, Manager, Counseling Dep't, Polaroid Corp.) (detailing impact of domestic violence on business' bottom line, including attendance, performance, increased medical claims).

Domestic violence has a particularly strong negative impact on the workplace, because "[w]omen who either cannot leave their homes or are afraid to show the physical effects of the violence" either forgo work or are hampered in their ability to work. 1991 S. Hearing 241 (testimony of National Federation of Business and Professional Women). Witnesses' accounts detailed how batterers prevent or interfere with their partners' jobs. See, *e.g.*, *Domestic Violence: Not Just a Family Matter: Hearing Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 103d Cong. 17 (1994) (testimony of Karla Digirolamo) (husband either kept partner at home or she was unable to leave because of the visible injuries); Apr. 1993 S. Hearing 55, 57-58 (Barbara Wood, Executive Director, Turning Point) (husband followed woman to work, during breaks and during lunchtime to make sure she spoke to no one); *accord* 1991 S. Hearing 242 (study showed one-third of battered women reported that their abusers prevented them from working).

Congress also noted the economic and commercial impacts of gender-motivated violence outside of the workplace. It found that gender-motivated violence can force victims into poverty, and that many victims need to seek the support of government benefits and social services. *E.g.*, 1990 S. Rep. 37 ("as many as 50 percent of homeless women and children are fleeing domestic violence"). Additional evidence revealed that violence against women gives rise to significant health care and government expenditures, and other costs that affect the economy at large. 1993 S. Rep. 41. See also 1990 S. Rep. 33 ("*Partial* estimates show that violent crime against women costs this country at least 3 billion -- not million, but billion -- dollars a year") (emphasis added).

Finally, in a finding that has disturbing resonance for this case, Congress found that the "devastation" and potential economic and employment effects of gender-motivated violence

are "often magnified for young women attending college," *id.* at 44, and that "rape on campus is widespread and poses a grave threat not only to students' physical well-being but also to their educational opportunities." 1991 S. Rep. 62; see *Violence Against Women: Fighting the Fear: Hearing Before the Senate Comm. on the Judiciary*, 103d Cong. 41 (1993) (S. Hearing No. 103-878, Nov. 12, 1993) ("Nov. 1993 S. Hearing") (victim testimony recounting lost concentration and interest in school after sexual assault on campus). Congress observed that it is not unusual for many student victims, particularly freshmen, to "drop out of school altogether" and that other student victims "feel it necessary to interrupt [their] college career[s] simply to avoid [their] attacker[s]." 1990 S. Rep. 44.

States' Persistent Inability to Remedy the Problem:

Congress made extensive findings that State efforts have been inadequate to protect women from gender-motivated violence and that the Civil Rights Remedy was necessary to ensure equal protection of the laws. Congress expressly found:

> State and Federal criminal laws do not adequately protect against the bias element of crimes of violence motivated by gender, which separates these crimes from acts of random violence, nor do these adequately provide victims of gender-motivated crimes the opportunity to vindicate their interests; existing bias and discrimination in the criminal justice system often deprives victims of crimes of violence motivated by gender of equal protection of the laws and the redress to which they are entitled; . . . a Federal civil rights action as specified in this section is necessary to guarantee equal protection of the laws . . . and the victims of crimes of violence motivated by gender have a right to equal

> protection of the laws, including a system of justice that is unaffected by bias or discrimination and that, at every relevant stage, treats such crimes as seriously as other violent crimes.

1994 Conf. Rep. 385-86. See also 1993 S. Rep. 41 (citing Washington, D.C. study finding that, in 85% of cases where a woman was found bleeding, police failed to arrest her attacker); *id.* at 44 ("State remedies are inadequate to fight bias crimes against women"); *id.* at 55 (Act "provides a necessary remedy to fill the gaps and rectify the biases of existing State laws"); 1991 S. Hearing 135-36 (testimony of Gill Freeman, Chair, Florida Supreme Court Gender Bias Study Implementation Committee) (citing examples of state court judges' gender bias, including judge's comment to convicted rapist that he should learn to "'take the women out to dinner first, like the rest of us'").

This systemic discrimination is often embodied in formal legal barriers to civil and criminal suits, which Congress found were rooted in a long history of discriminatory treatment. As of 1990, seven states still did not permit prosecutions of marital rape; 26 additional states allowed marital rape prosecutions only under limited circumstances, such as when there is evidence of physical injury; and numerous other states limited prosecutions of cohabitants or dating companions. 1993 S. Rep. 42; 1991 S. Rep. 45 & nn.49-50, 54; 1990 S. Rep. 41 n.78. Ten states still formally barred women from bringing tort actions against their abusive husbands. *Women and Violence: Hearing Before the Senate Comm. on the Judiciary*, 101st Cong. 64 (1990) ("1990 S. Hearing") (statement of Helen Neuborne, Executive Director, NOW Legal Defense and Education Fund). State laws limiting rape shield provisions to criminal prosecutions exposed women bringing tort actions for sexual assault to intrusive questioning about consensual sexual activity unrelated to the attack. 1991 S. Rep. 46 (citing Iowa

civil case in which judge permitted questioning about victim's "sex life after the rape," her use of birth control and her "reputation of having 'wild parties'"). Further, although almost every state had enacted hate crime legislation, Congress found that "less than a dozen cover gender bias." 1993 S. Rep. 48.

Congress also found systemic discrimination reflected in a host of informal -- but entrenched -- practices that "[a]t every step of the way" "pose[] significant hurdles for victims of sexual assault." *Id.* at 42. Reviewing states' own gender bias task force reports, Congress noted that, "[s]tudy after study commissioned by the highest courts of the states -- from Florida to New York, California to New Jersey, Nevada to Minnesota -- has concluded that crimes disproportionately affecting women are often treated less seriously than comparable crimes against men." 1991 S. Rep. 43. See *id.* at 33-35, 41. For example, "[p]olice may refuse to take reports; prosecutors may encourage defendants to plead to minor offenses; judges may rule against victims on evidentiary matters; and juries too often focus on the behavior of the survivors -- laying blame on the victims instead of on the attackers." 1993 S. Rep. 42.

The legislative record demonstrated that state officials often subject female victims of violence to treatment that prosecuting witnesses in other assault or battery cases would never face. Some state and local authorities authorize psychiatric exams or polygraph tests of rape victims, casting doubt on their credibility as witnesses. 1991 S. Rep. 45; *id.* at 45-46. See also *id.* at 46-47 ("[j]udges and juries expect more corroboration in sexual assault cases than in other cases of a similar class, even when there is no such legal requirement"); *id.* at 47 ("survivors must also face pervasive victim-blaming attitudes"); *id.* ("in some counties, acquaintance rape cases simply are not prosecuted"). Judges still issue the antiquated jury instruction that rape is an accusation "'easily to be made and hard to be proved, and harder to be defended by the party

accused, tho' ever so innocent,'"despite several courts' rejection of the instruction. 1991 S. Rep. 46; see 1993 S. Rep. 45.

Congress found that, as a result of these practices, state criminal and civil justice systems preclude a large proportion of victims of gender-motivated violence from obtaining redress. For example, Congress found:

> [O]ver 60 percent of rape reports do not result in arrests; and a rape case is more than twice as likely to be dismissed as a murder case and nearly 40 percent more likely to be dismissed than a robbery case. Less than half of the individuals arrested for rape are convicted of rape. In comparison, 69 percent of those arrested for murder are convicted of murder, and 61 percent of those arrested for robbery are convicted of robbery. Finally, over one-half of all convicted rapists serve an average of only 1 year or less in prison.

1993 S. Rep. 42 (footnotes omitted). See also *id.* at 38 ("Almost one-quarter of convicted rapists never go to prison and another quarter received sentences in local jails where the average sentence is 11 months."). This discrimination pervades the civil system as well, where a victim seeking damages for sexual assault must be prepared to risk embarrassing and harassing questions about the intimate details of her sex life because rape shield laws do not apply. 1991 S. Rep. 46.

Throughout the legislative process, Congress solicited input from the states about the problem of gender-motivated violence. The states candidly acknowledged their inability to provide adequate remedies to victims of gender-motivated violence and recognized that the proposed federal law would provide much-needed, and welcomed, assistance. State and local officials and

law enforcement officers presented testimony to that effect,[8] and much of the legislative evidence of the states' institutional discrimination came directly from reports prepared by state courts and submitted for Congress' consideration. See 1991 S. Rep. 43-44 & n.40 (citing numerous state task force reports); 1993 S. Rep. 45 n.29, 46 n.35, 49 n.52 (same); Maj. Staff. Rep. 5 n.7 (same). Finally, in a striking display of State support for a federal civil rights law, 41 state Attorneys General from 38 states urged Congress to enact the Civil Rights Remedy, stating that:

> the current system for dealing with violence against women is inadequate. Our experience as Attorneys General strengthens our belief that the problem of violence against women is a national one, requiring federal attention, federal leadership and federal funds. [VAWA] would begin to meet those needs by, *inter alia*, . . . creating a specific federal civil rights remedy for the victims of gender-based crimes . . . .

1993 H. Hearing 34-36 (1993) ("Attorneys General Letter"); *accord* 1991 S. Hearing 37-39 (Resolution of the National Association of Attorneys General unanimously urging VAWA's passage).

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[8] *See, e.g.*, Bonnie Campbell, Iowa Attorney General, and Roland Burris, Ill. Attorney General (1991 S. Hearing 33, 65-66); Duluth Police Chief Miletich (*Domestic Violence: Terrorism in the Home: Hearing Before the Subcomm. on Children, Family, Drugs, and Alcoholism of the Senate Comm. on Labor and Human Resources*, 101st Cong. 90, 93 (1990)); Sarah M. Buel, Director, Domestic Violence Unit, District Attorney's Office, Suffolk County, Mass. (Feb. 1993 S. Hearing 4); Margaret Rosenbaum, Assistant State Attorney, Miami, Fl., and Gy Pfeiffer, Chief Magistrate of Crisp City, Ga. (*Violence Against Women: Hearing Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 102d Cong. 70, 75, 86 (1992)); Kimberly Hornak, Salt Lake County Attorney's Office (Apr. 1993 S. Hearing 44).

C. Procedural Background

On December 27, 1995, Brzonkala filed suit against Morrison, Crawford and Virginia Tech in the United States District Court for the Western District of Virginia. Her amended complaint, filed March 1, 1996, alleged, in part, that Morrison and Crawford brutally gang-raped her, which was the basis for her claim pursuant to the Civil Rights Remedy.

Defendants Morrison and Crawford moved to dismiss Brzonkala's Civil Rights Remedy claim on the grounds that she had not stated a claim and that the Civil Rights Remedy was unconstitutional. The United States intervened as of right to defend the law's constitutionality. On July 26, 1996, the district court held that Brzonkala's complaint stated a claim under the Civil Rights Remedy, but struck down the law as unconstitutional. App. at 402a. The district court held that Congress lacked authority to enact the law under either the Commerce Clause or Section 5 of the Fourteenth Amendment. *Id.* at 376a, 398a.

On December 23, 1997, a panel of the Fourth Circuit reversed, holding that Brzonkala's complaint stated claims under the Civil Rights Remedy, and that Congress had constitutionally exercised its commerce powers when it enacted the Civil Rights Remedy. The court concluded that the law was a rational response to the legislative record, which documented the myriad ways gender-based violence interferes with women's full participation in interstate commerce and otherwise affects interstate movement and activities of women. App. at 310a.

The Fourth Circuit vacated the panel opinion and granted rehearing *en banc* on February 5, 1998. On March 5, 1999, the *en banc* court unanimously held that Brzonkala had stated a claim pursuant to the Civil Rights Remedy, but, in a 7-4 decision, concluded that the law was unconstitutional because it exceeded Congress' powers under both the Commerce Clause

and the Fourteenth Amendment. App. at 6a.[9] The dissenting judges would have upheld the law under the Commerce Clause and therefore did not address the scope of Congress' authority under Section 5. *Id.* at 224a n.1.

SUMMARY OF ARGUMENT

This Court has made a "definitive commitment to [a] practical conception of [Congress'] commerce power," *United States* v. *Lopez*, 514 U.S. 549, 573 (1995) (Kennedy, J. concurring), and thus has rejected the kind of formalistic, bright-line rule the Fourth Circuit adopted in this case. *Id.* at 567; *id.* at 569-74 (Kennedy, J., concurring). Under this Court's pragmatic approach, the Civil Rights Remedy is constitutional, because it is supported by four important factors relevant to Commerce Clause analysis. Each of these factors provides a principled basis for distinguishing *Lopez*, and collectively these considerations provide ample grounds to uphold the Civil Rights Remedy as constitutional.

First, like the anti-discrimination legislation upheld in *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 261-62 (1964), and *Katzenbach* v. *McClung*, 379 U.S. 294, 305 (1964), the Civil Rights Remedy seeks to eliminate a substantial barrier to the full participation of a specific group -- here, women -- in the national economy and interstate commerce. As Congress found, the widespread and pervasive effects of gender-based violence, like the consequences of racial discrimination, affect the most basic of economic activities, including where women live and if and where they are able to work.

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[9] Brzonkala also brought a claim against Virginia Tech under Title IX of the Education Amendments of 1972. That claim was dismissed by the district court but reinstated by the panel. The *en banc* court remanded the Title IX claim to the district court for reconsideration following this Court's ruling in *Davis* v. *Monroe County Board of Education* 119 S. Ct. 1661, 1676 (1999). No issues concerning the Title IX claim are before the Court.

Second, Congress expressly and reasonably found, based on extensive hearings, that gender-based violence substantially affects interstate commerce. In particular, Congress reasonably relied on compelling empirical data, showing, *inter alia*, that nearly 50 percent of rape victims lose or are forced to quit their jobs; that homicide is the leading cause of death for women at work; and, that violence against women causes many college students to interrupt or terminate their college education.

Third, Congress expressly and reasonably found that the states have not remedied the national problem of gender-based violence. Again, the proof includes hard empirical evidence. For example, rape cases have higher dismissal and lower conviction rates than other violent crimes. Indeed, 41 state Attorneys General urged Congress to adopt the Civil Rights Remedy because "the current system for dealing with violence against women is inadequate."

Fourth, the Civil Rights Remedy is not a criminal law and it does not displace any state laws or interfere with any state programs. This contrasts starkly with *Lopez*, where the statute was a criminal law whose "intrusion on state sovereignty" was "significant" because it displaced both state laws and state programs. *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring).

These factors also demonstrate that the Civil Rights Remedy is supported by the Necessary and Proper Clause, which traditionally has guided this Court's interpretation of the Commerce Clause. See *New York* v. *United States*, 505 U.S. 144, 158-59 (1992). The Civil Rights Remedy is necessary because, as Congress found, gender-motivated violence creates a substantial barrier to participation in interstate commerce, and the states have been unable to respond adequately to that problem. The Remedy is proper because it supplements, but

does not supplant, state efforts. Thus, the Civil Rights Remedy appropriately respects states' prerogatives and preserves their power to devise their own solutions to the problem of gender-based violence.

The Fourth Circuit's bright-line rule, that Congress may regulate intrastate activity only if it is "economic," not only transgresses *Lopez*'s rejection of bright-line rules, it is unnecessary and unwise. It is unnecessary because the Commerce Clause factors discussed above and the Necessary and Proper Clause set principled limits on Congress' commerce power. The statute in *Lopez* was unconstitutional because it exceeded those limits. The Fourth Circuit's unprecedented approach is unwise because it would deprive Congress of the practical flexibility to respond to future national problems that severely affect the national economy.

Finally, the Civil Rights Remedy is also a constitutional exercise of Congress' power under Section 5 of the Fourteenth Amendment. Based on an extensive inquiry described in the detailed legislative record, Congress identified equal protection violations analogous to those supporting other civil rights laws enacted under Section 5. Congress found that state laws and law enforcement policies and practices treated violent crimes against women less seriously than comparable crimes against men, and that historic and enduring discrimination against women seeking redress for those crimes denied women equal protection of the laws. The Civil Rights Remedy is a congruent and proportionate response because it authorizes a cause of action where bias and discrimination have historically barred relief.

ARGUMENT

I. THE CIVIL RIGHTS REMEDY IS WITHIN CONGRESS' COMMERCE POWER.

Congress' exercise of its Commerce Clause authority is best analyzed on a case-by-case basis, rather than through rigid application of generalized, abstract tests that may not fit specific cases. The Civil Rights Remedy is constitutional because it is supported by four factors established by this Court's Commerce Clause decisions, as affirmed in *United States* v. *Lopez*, 514 U.S. 549, 568 (1995): (1) The Civil Rights Remedy removes discriminatory barriers to the participation of a specific group of persons in interstate commerce and the national economy; (2) Congress reasonably found that gender-based violence has a substantial effect on interstate commerce; (3) Congress reasonably found that states were unable adequately to remedy the problem; and (4) the Civil Rights Remedy does not infringe on state sovereignty by displacing state laws or programs. The Court need not decide whether satisfaction of three or fewer of these factors would be sufficient to sustain a different statute, because the Civil Rights Remedy satisfies all four factors.

A. The Civil Rights Remedy Is Constitutional Because It Is Fully Consistent With Four Critical Factors Established By This Court's Commerce Clause Decisions.

The modern Court has taken a pragmatic approach to evaluating Congress' power to regulate intrastate activity. Consistent with the Court's Commerce Clause jurisprudence over the last 60 years, *Lopez* expressly rejected any rigid, formalistic test for determining whether particular legislation is within the commerce power, because Congress' power to regulate in the ever-changing area of commerce and the national economy cannot be reduced to "precise formulations." *Lopez*, 514 U.S. at 567; see *NLRB* v. *Jones & Laughlin Steel Corp.*,

301 U.S. 1, 37 (1937). As Justices Kennedy and O'Connor explained in their concurring opinion in *Lopez* (the "Kennedy-O'Connor concurrence"), previous attempts to establish formalistic tests were wrong and proved unworkable. See *Lopez*, 514 U.S. at 573 (Kennedy, J., concurring) (affirming Court's "definitive commitment" to a "practical conception of the commerce power"). Thus, Congress' commerce power is commensurate with the "purpose to build a stable national economy." *Id.* at 574 (Kennedy, J., concurring); see *id.* at 579 (Kennedy , J., concurring).

1. The Commerce Clause Authorizes Congress To Combat Discriminatory Conduct That Creates A Substantial Barrier To The Full Participation Of Specific Groups In The National Economy.

a. Twice in modern history, the Court has upheld as within the commerce power federal anti-discrimination legislation, that, like the Civil Rights Remedy, was aimed at removing documented intrastate barriers to the participation of specific groups of persons in interstate commerce and the national economy. See *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 252-53 (1964); *Katzenbach* v. *McClung*, 379 U.S. 294, 299-301 (1964), cited with approval in *Lopez*, 514 U.S. at 557. The rationale of these two landmark decisions upholding the Civil Rights Act of 1964 is that pervasive discrimination against specific groups of people had a substantial negative impact on the economy, far beyond that attributable to the specific acts of private discrimination. The Court reasoned that such pervasive and cumulative impact is a proper basis for federal intervention.

In *Heart of Atlanta*, a motel refused to rent rooms to African-Americans. 379 U.S. at 243. The Court upheld the statute's prohibition of discrimination in accommodations because the legislative record was "replete with evidence of the burdens that discrimination by race or color places upon

interstate commerce." *Id.* at 252. Specifically, Congress found that racial discrimination in accommodations was a "nationwide" problem that "had the effect of discouraging travel on the part of a substantial portion of the Negro community." *Id.* at 253; see also *id.* at 275-76 (Black, J., concurring).

Similarly, in *McClung*, the statute was applied to a local family restaurant that refused to serve African-Americans. Although the restaurant procured some food supplies from outside the state, it served mostly local residents. 379 U.S. at 296-97. As in *Heart of Atlanta*, the Court noted that the legislative record was "replete with testimony of the burdens placed on interstate commerce by racial discrimination in restaurants." *Id.* at 299. Specifically, "there was an impressive array of testimony that discrimination in restaurants had a direct and highly restrictive effect upon interstate travel by Negroes. . . . This obviously discourages travel and obstructs interstate commerce." *Id.* at 300. Further, evidence showed that "discrimination deterred professional, as well as skilled, people from moving into areas where such practices occurred and thereby caused industry to be reluctant to establish there." *Id.* In light of this evidence, this Court held that Congress "had a rational basis for finding that racial discrimination in restaurants" had a substantial adverse effect on interstate commerce. *Id.* at 304.

Although in both *Heart of Atlanta* and *McClung* the specific private acts of discrimination were nominally "economic," Congress and the Court were primarily concerned with the more general and pervasive effects of widespread racial discrimination on the economy. The Court held that Congress had power to reach intrastate discriminatory activities "which directly *or indirectly* burden or obstruct interstate commerce." *Id.* at 302 (emphasis added). As Justice Black recognized, discrimination can impose a variety of "obstructions" and

"restraints" on interstate commerce, and individual acts of discrimination must be analyzed with "regard to the fact that [a] single local event when added to many others of a similar nature may impose a burden on interstate commerce." *Heart of Atlanta*, 379 U.S. at 275 (Black, J., concurring).

The Commerce Clause thus allows Congress to regulate discriminatory activity when it has a rational basis for finding that discrimination against a particular group creates a substantial barrier to its effective participation in interstate commerce, even where the discriminatory activity is not motivated by economic reasons. See, *e.g.*, *id.* at 243-44, 257, 260 (discriminatory barriers to participation in commerce motivated by racial animus and bias); cf. *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564, 583-84 (1997) (Commerce Clause applies regardless of whether activity at issue is profit-driven); *National Organization for Women, Inc.* v. *Scheidler*, 510 U.S. 249, 262 (1994) (predicate acts under RICO, federal statute enacted pursuant to commerce power, need not be economically motivated). Because the Gun Free School Zones Act (GFSZA) was not civil rights antidiscrimination legislation aimed at ensuring that entire groups were not unfairly excluded from participating in the national economy, the statute in *Lopez* was not supported by this significant element of Congress' commerce power.

b. In enacting the Civil Rights Remedy, Congress expressly found that gender-motivated violence against women was both a national civil rights problem and a barrier to full participation of women in the national economy. The Civil Rights Remedy expressly states that its purpose is "to protect the civil rights of victims of gender motivated violence and to promote public safety, health, and activities affecting interstate commerce by establishing a Federal civil rights cause of action." 42 U.S.C.

§ 13981(a). Like the 1964 Civil Rights Act provisions affirmed in *Heart of Atlanta* and *McClung*, the Civil Rights Remedy is anti-discrimination legislation designed to remove a barrier that prevents women from "full partic[ipation] in the national economy." 1993 S. Rep. 54. Like racial discrimination, gender-based violence causes real, direct economic effects, most starkly reflected in the ways it causes women to forgo certain jobs, and to lose others. See *supra* at 10-13.

Also, like the Civil Rights Act of 1964, the Civil Rights Remedy responds to the cumulative economic impact of discriminatory conduct. See, *e.g.*, 1993 S. Rep. 54-55; 1990 Sen. Rep. 43 ("Gender-based crimes and the fear of gender-based crimes restricts movement, reduces employment opportunities, increases health expenditures, and reduces consumer spending, all of which affect interstate commerce and the national economy."). Congress' findings concerning that economic impact are not merely reasonable, they are compelling. See *supra* at 10-13; *infra* at 28-29.

2. Congress Reasonably Found That Gender-Based Violence Substantially Affects Interstate Commerce.

a. As *Lopez* reaffirmed, intrastate activity is within the commerce power if a "rational basis" exists for Congress to conclude "that a regulated activity sufficiently affect[s] interstate commerce." 514 U.S. at 557; see *Fry* v. *United States*, 421 U.S. 542, 547 (1975) ("Even activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States."). The scope of the commerce power is determined by the presence of a substantial *effect* on interstate commerce, whatever the kind of activity, not by categorization of the activity at issue. *E.g.*, *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, 121

(1942) ("It is the effect upon interstate commerce . . . not the source of the injury which is the criterion of Congressional power."); *United States* v. *Women's Sportswear Mfg. Ass'n*, 336 U.S. 460, 464 (1949) ("If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.").

While a reviewing court must, of course, make its own judgment as to whether Congress had a rational basis for its conclusions regarding the effects of the regulated activity, the court "must defer to a congressional finding that a regulated activity affects interstate commerce 'if there is any rational basis for such a finding.'" *Preseault* v. *ICC*, 494 U.S. 1, 17 (1990); see *Lopez*, 514 U.S. at 557; see also *McClung*, 379 U.S. at 303-04 ("where we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end"). As the Kennedy-O'Connor concurrence explained, "[w]hatever the judicial role, it is axiomatic that Congress does have substantial discretion and control over the federal balance." *Lopez*, 514 U.S. at 577 (Kennedy, J., concurring); *id.* at 579 ("The substantial element of political judgment in Commerce Clause matters leaves our institutional capacity to intervene more in doubt" than in other areas of constitutional law.) (Kennedy, J., concurring). Explicit congressional findings regarding the effect of the regulated activity on interstate commerce assist the courts in understanding and evaluating Congress' judgment about the effects of the regulated activity, even where -- unlike here -- "no . . . effect [i]s visible to the naked eye." *Id.* at 563.[10]

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[10]Because the extent to which gender-motivated violence affects interstate commerce is a highly fact-intensive inquiry into societal facts, *see supra* at 6-13, that determination is peculiarly within the institutional competence of the legislature, and outside the competence of the judiciary. As the Court has held, "[w]hen Congress makes findings on essentially factual issues... those findings are of course entitled to a great deal of deference, inasmuch

Lopez held that the GFSZA was not founded on a rational congressional determination that the regulated activity substantially affected interstate commerce. *Id.* at 562-64. Indeed, there were no congressional findings whatsoever concerning the effect of the regulated activity on commerce. As the government conceded in that case, "'[n]either the statute nor its legislative history contain[s] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone.'" *Id.* at 562 (quoting brief for United States) (alterations in original).

b. Here, the substantial effects on commerce and the national economy are plain. Based on extensive hearings conducted over a period of more than four years, Congress expressly found that gender-motivated violence substantially affects interstate commerce in myriad ways, including "deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business[es], and in places involved, in interstate commerce." 1994 Conf. Rep. 385. Congress further found that gender-based violence reduces women's employment opportunities and productivity, thereby reducing national economic productivity; increases the costs of health care and absenteeism; reduces both the supply of and demand for interstate products; reduces consumer spending; and bars women from full participation in the national economy. See, *e.g.*, *id*; 1993 S. Rep. 54; see generally *supra* at 6-17.

The link between violence against women and commerce is clear and direct: such violence prevents women's very participation in the national economy. The detrimental effect is not just a matter of inference, it is reflected in sobering data and statistics. To cite but a few examples, Congress found that

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as Congress is an institution better equipped to amass and evaluate the vast amounts of data bearing on such an issue." *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 330 n.12 (1985).

nearly 50 percent of rape victims lose, or are forced to quit, their jobs, and that homicide is the leading cause of death for women at work. See *supra* at 11. Gender-motivated violence causes women to forgo or lose jobs; impedes women from traveling to and from work; decreases productivity; and, particularly germane to Brzonkala, forces women to interrupt or drop out of the college education that has become necessary for full participation in a modern economy. See *supra* at 10-13. Because Congress' findings of these and other substantial effects of gender-based violence against women on commerce and the national economy are express, rational and well-supported, this Court should defer to the judgment of Congress and uphold the Civil Rights Remedy. See, *e.g.*, *Preseault*, 494 U.S. at 17; *supra* at 6-17.

3. Congress Reasonably Found That The States Have Not Remedied The Problem.

a. Under the "practical conception" of Congress' commerce power, *Lopez*, 514 U.S. at 572 (Kennedy, J., concurring), congressional exercise of that authority to address intrastate activities affecting interstate commerce is most appropriate when Congress reasonably finds that the states have been unwilling or unable to remedy the problem at issue. See, *e.g.*, *Perez* v. *United States*, 402 U.S. 146, 150 (1971) (upholding statute criminalizing wholly intrastate loan-sharking, based in part on congressional finding that "[t]he problem simply cannot be solved by the states alone. We must bring into play the full resources of the Federal Government.").

Indeed, the Framers recognized that it was imperative that the national government have the power to remedy national problems that the states were unable to resolve. On July 17, 1787, the Constitutional Convention adopted the following resolution describing the powers of the national legislature:

> That the Natl. Legislature ought to (possess) the Legislative Rights vested in Congs. by the Confederation. . . . and moreover to legislate in all cases for the general interests of the Union, and also *in those to which the States are separately incompetent* . . . .

Sixth Virginia Resolution, 2 *Records of the Federal Convention of 1787*, at 16-17, 21 (M. Farrand ed. 1911) (emphasis added) (footnote omitted).[11]

In *Lopez*, there were no congressional findings concerning states' inability to address gun possession at schools. Rather, the States were implementing criminal laws outlawing possession of firearms on school grounds, and crafting other pragmatic local solutions to the problem. *Lopez*, 514 U.S. at 581-82.

b. Here, Congress' findings that the states were unable adequately to address the problem of violence against women are compelling. Congress found that existing state efforts were inadequate to combat the pervasive problem of gender-motivated violence; that formal and informal barriers erected by state justice systems effectively precluded meaningful relief for many women victimized by gender-based violence; and that a national remedy was therefore necessary to address the widespread problem of violence against women and its attendant effects on the national economy. See *supra* at 6-17.

The bases for Congress' findings included formal impediments like state interspousal immunities and evidentiary rules, and statistical, empirical proof. As recounted above, a rape case is "more than twice as likely to be dismissed as a murder case and nearly 40 percent more likely to be dismissed

[11]The Convention unanimously passed a motion delegating to the "Committee of Detail" the task of distilling the resolutions adopted by the full Convention to the single document that became the Constitution. 2 *Records of the Federal Convention of 1787*, at 95 (M. Farrand ed. 1911).

as a robbery case." *Supra* at 16. The vast majority of rape reports do not result in arrests; rape cases are far more likely to result in acquittals than cases involving other comparable violent crimes; and even convicted rapists serve an average of only one year in jail. *Id.*

Unlike the problem of firearm possession in schools at issue in *Lopez*, here the states themselves recognized the need for a federal remedy to address this invidious and persistent problem. Forty-one state Attorneys General from 38 states urged Congress to adopt the Civil Rights Remedy, concluding, based on their experience as Attorneys General, that the existing system for dealing with violence against women was "inadequate" and that "the problem of violence against women is a national one, requiring federal attention . . . ." 1993 H. Hearing 34-36 (Attorneys' General Letter).

When, as here, history and logic provide reason to fear that bias in the state courts will affect a particular kind of claim, it is both rational and reasonable to provide a forum for such claims in the federal courts. The federal courts have institutional safeguards against bias -- *e.g.*, Presidential appointment rather than election, Senate scrutiny prior to confirmation, life tenure, salary protection -- that are not universally replicated in the state courts. Federal courts thus can provide an alternative forum for redress in those circumstances, such as gender-motivated violence, when state measures are concededly ineffectual.[12]

[12]Of course, under the Civil Rights Remedy, victims of gender-based violence remain free to pursue their remedies in state court. *See supra* at 9.

4. The Civil Rights Remedy Does Not Intrude On State Sovereignty Or Traditional State Functions, Nor Does It Impair The States' Ability To Respond To Gender-Motivated Violence.

a. An important function of this Court's Commerce Clause jurisprudence is to preserve the federal-state balance. See, *e.g.*, *Lopez*, 514 U.S. at 557; *id.* at 580 (Kennedy, J., concurring) (to determine whether act is within commerce power, Court "must inquire whether the exercise of national power seeks to intrude upon an area of traditional state concern"). Justice Black aptly described the federal-state balance inherent in the concept of federalism:

> The concept does not mean blind deference to "States Rights" any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government . . . will not unduly interfere with the legitimate activities of the States.

Younger v. *Harris*, 401 U.S. 37, 44 (1971).

This Court has emphasized the primacy of state interests in the federalism balance in instances in which a federal statute commands a state what it must or cannot do. Thus, principles of federalism prevent the national government from "commandeering" state government by compelling states to enact or administer a federal regulatory program, see *New York* v. *United States*, 505 U.S. 144, 161 (1992); *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 268 (1981); by requiring them to assume private entities' damages liability, *New York*, 505 U.S. at 175-76; by obligating state criminal law enforcement officials to administer and execute

federal law, *Printz* v. *United States*, 521 U.S. 898, 905 (1997); or by authorizing certain lawsuits by private individuals that seek to impose financial liabilities or obligations on the States, *Alden* v. *Maine*, 119 S. Ct. 2240, 2246 (1999).

In important respects, the statute at issue in *Lopez* prohibited the states from carrying out their own solutions and programs regulating firearms and education. It therefore overrode and displaced state authority in two areas of traditional state concern, criminal law and education. See *Lopez*, 514 U.S. at 561 n.3; *id.* at 580 (Kennedy, J., concurring). In addition, by precluding the states from implementing their own alternative solutions, such as programs involving turning in guns at schools, the GFSZA "foreclose[d] the states from experimenting . . . in an area to which States lay claim by right of history and expertise." *Id.* at 583 (Kennedy, J., concurring). As the Kennedy-O'Connor concurrence emphasized, the GFSZA's "intrusion on state sovereignty" was "significant." *Id.*

b. The Civil Rights Remedy is different in kind from the GFSZA and other statutes this Court has invalidated on federalism grounds. The Remedy does not impose obligations or liabilities on the states, or compel the states to administer federal programs. Compare *supra* at 32-33. Nor does it displace state criminal law or interfere with the states' ability to carry out their own programs.

The Constitution permits the federal government to exercise concurrent jurisdiction in areas that are of national and local concern. As this Court's touchstone opinion in *Gregory* v. *Ashcroft* states: "Congress may legislate in areas traditionally regulated by the States." 501 U.S. 452, 460 (1991); see *Alden*, 119 S. Ct. at 2247 (Founders created system requiring that, where national government has the power to regulate, the "State and Federal Governments would exercise concurrent authority over the people"). The Civil Rights Remedy exercises such

concurrent jurisdiction and strictly circumscribes federal court jurisdiction. It is not a criminal law, it neither displaces any state laws nor preempts any state court jurisdiction, and it expressly prevents the federal courts from adjudicating domestic relations matters. See 42 U.S.C. § 13981(e)(4). Indeed -- in stark contrast to *Lopez* -- the Civil Rights Remedy is entirely supplemental, because it does not displace a single state or local law, regulation, or program. As the Kennedy-O'Connor concurrence recognized, the modern Court has never struck down a federal statute on Commerce Clause or other federalism grounds absent an "intrusion on state sovereignty" that was "significant." *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring). Here, there is *no* intrusion whatsoever.

Rather, the Civil Rights Remedy is a model of cooperative federalism. It attempts to address a national problem that has stymied the states, and preserves to the states the right and capacity to take whatever additional preventive measures they deem appropriate. See *Hodel*, 452 U.S. at 289 (upholding statute providing for cooperative federalism); cf. *FERC* v. *Mississippi*, 456 U.S. 742, 783 n.12 (1982) (O'Connor, J., concurring in part and dissenting in part) ("'A federal system implies a partnership, all members of which are effective players on the team and all of whom retain the capacity for independent action. It does not imply a system of collaboration in which one of the collaborators is annihilated by the other.'") (quoting L. White, *The States and the Nation* 3 (1953)). The Civil Rights Remedy leaves the states completely free to address the problem of gender-motivated violence with their own alternative solutions, thus preserving their role as "laboratories of democracy." See *Lopez*, 514 U.S. at 582-83 (Kennedy, J., concurring); *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932).

The Civil Rights Remedy, moreover, does not address a matter of purely local concern. Rather, it addresses a problem of national dimension with national consequences. This Court has recognized on numerous occasions that the commerce power properly confers on Congress substantial power to address national problems -- such as the discrimination addressed in *Heart of Atlanta* and *McClung* -- even where the activity at issue is conducted intrastate.[13] Civil rights and anti-discrimination legislation are historic functions of the federal government. See *supra* at 23-26; see generally, *Bray* v. *Alexandria Women's Health Clinic*, 506 U.S. 263, 345-55 (1993) (O'Connor, J., dissenting) (Reconstruction-era civil rights statute was intended to reach all conspiracies to deprive a person of equal protection of the laws that were motivated by "class-based-animus," including animus against women.).

This Court in *Lopez* did not condemn Congress to stand idly by and watch as discrimination excludes a large segment of the nation's population from participating in interstate commerce on an equal footing, while the states remain incapable of responding to the problem effectively. Rather, the Commerce Clause properly empowers Congress to address the national economic problem posed by gender-based discriminatory violence.

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[13] *See, e.g., NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 24, 49 (upholding National Labor Relations Act, which was enacted to address national problems of "'strikes,'" and "'industrial strife and unrest'") (quoting 29 U.S.C. § 151); *see also, FERC* v. *Mississippi*, 456 U.S. 742, 771 (upholding federal power to regulate intrastate power generation, transmission, and rates in response to a national energy crisis); *Wickard* v. *Fillburn*, 317 U.S. 111, 118-29 (1942) (upholding application of Agricultural Adjustment Act of 1938 to intrastate wheat consumption; Act was designed to address national problem of commodity price fluctuations and price extremes).

B. The Civil Rights Remedy Is Also Supported By The "Necessary And Proper" Clause.

The Court has recognized that the "Necessary and Proper Clause," U.S. Const. art. I, § 8, cl. 18, defines both the scope and the limits of Congress' power to regulate intrastate activity under the Commerce Clause. See *New York*, 505 U.S. at 158 (Court's construction of commerce power is "guided . . . by the Constitution's Necessary and Proper Clause"); *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 585 (1985) (O'Connor, J., dissenting) (noting that Necessary and Proper Clause is source of congressional power to regulate intrastate activity affecting interstate commerce, and has served as the basis for "every recent decision concerning the reach of Congress to activities affecting interstate commerce") (citing, *inter alia*, *Heart of Atlanta Motel*, 379 U.S. at 258-59; *Wickard* v. *Fillburn*, 317 U.S. 111, 124 (1942); *United States* v. *Darby*, 312 U.S. 100, 124 (1941)). When applied in conjunction with federalism concerns, the Necessary and Proper Clause provides an important textual limit on congressional regulation of intrastate activity.[14]

First, the crux of the Court's decisions holding that the commerce power extends to intrastate activity is that the Necessary and Proper Clause provides Congress with the authority to regulate intrastate activities where such regulation is *necessary* to the effective exercise of Congress' power and responsibility to regulate commerce. See, *e.g.*, *United States* v. *Darby*, 312 U.S. 100, 116-17 (1941). Thus, Congress may

[14] The statute at issue in *Lopez* was neither necessary nor proper. It was not necessary because national legislation was not needed to protect interstate commerce and because state law and programs were already addressing the problem. *See supra* at 32. It was not proper because it "significant[ly]" intruded on state sovereignty by displacing state laws and programs and foreclosing future efforts by the States to address the problem. *See id.*

"resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end." *Id.* at 124; see *Garcia*, 469 U.S. at 584-86 (O'Connor, J., dissenting); *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 43-49 (1937); see generally, *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 411-21 (1819). In *Wickard* v. *Fillburn*, the Court unanimously held that the commerce power extended to wholly intrastate consumption of wheat, because regulation of that activity was *necessary* to the effective implementation of Congress' regulation of commerce in wheat. 317 U.S. at 129. In so holding, the Court made clear that "even if [the] activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce." *Id.* at 125. Separation of powers principles require judicial deference to rational congressional judgments regarding the necessity of a particular means or method to effectuate the commerce power. See, *e.g.*, *Darby*, 312 U.S. at 120-21; *Legal Tender Case*, 110 U.S. 421, 450 (1884); *M'Culloch*, 17 U.S. at 421.

The Civil Rights Remedy was *necessary* to the removal of substantial, discriminatory barriers to the participation of women in commerce and the national economy. Congress made clear, explicit, and compelling findings that gender-motivated violence creates a substantial barrier to participation in commerce, and has a significant detrimental effect on it. See *supra* at 6-13. Congress' rational findings that state efforts had not adequately responded to the national problem of violence against women, and its deleterious effects on interstate commerce, further demonstrate the Remedy's necessity. See *supra* at 9-17.

Second, federal courts' role in deciding whether congressional regulation is "proper" is to ensure that state interests and sovereignty are adequately protected against undue

intrusion by the national government. See *Gregory*, 501 U.S. at 458-59. When a court determines that congressional regulation under the commerce power unduly intrudes on the powers and interests of the states, that regulation is not "proper" because it trespasses on powers and functions of the States protected by the plan of the Constitution. See, *e.g.*, *Lopez*, 514 U.S. at 574-76 (Kennedy, J., concurring); *Gregory*, 501 U.S. at 458-59.

The cooperative solution embodied in the Civil Rights Remedy is proper because it supplements -- but does *not* supplant -- state efforts to address a serious problem. As discussed, *supra* at 31-35, unlike the GFSZA at issue in *Lopez*, the Civil Rights Remedy in no way interferes with or limits the states' power or options to address the problem. The Civil Rights Remedy maintains the power and role of the states inherent in the structure of the Constitution, preserving the dual sovereignty that is the genius of our federal system.

C. The Fourth Circuit's Formalistic Bright Line Rule Is Unprecendented, Unnecessary, And Unwise.

The formalistic "bright line" test fashioned by the Fourth Circuit, which would prohibit Congress from regulating any intrastate conduct that is not "economic," is unprecedented, unnecessary, and unwise. See *Brzonkala* v. *Virginia Polytechnic Inst.*, 169 F.3d 820, 832-40 (4th Cir. 1999). It presents a significant risk of compromising Congress' future ability to address unanticipated national problems that states have been unable to remedy, but that Congress could address without intruding on state sovereignty. *First*, the novel test fashioned below is flatly inconsistent with *Lopez*, in which the Court rejected a bright line test, finding "[t]hese are not precise formulations, and in the nature of things they cannot be." *Lopez*, 514 U.S. at 567; see also *id.* at 568 (Kennedy, J., concurring) (*Lopez* holding was "necessary though limited"). History teaches that rigid, formalistic tests are both unwise and

unworkable in this area of the law. See, *e.g.*, *id.* at 569-74 (Kennedy, J., concurring) (describing content-based distinctions previously discarded by the Court as unworkable, including distinctions between "manufacturing" and "commerce," and between "direct" and "indirect" effects on commerce).

Second, the Fourth Circuit's bright line test is unnecessary because, as Petitioner has demonstrated, both a sensible analysis of four factors derived from this Court's Commerce Clause cases, and the Necessary and Proper Clause provide principled, practical limitations on Congress' power. It was precisely on the basis of those considerations that the Court declared the GFSZA unconstitutional in *Lopez*. Moreover, whether or not an activity is itself economic has never been the test of whether a particular regulation is within the power conferred by the Commerce Clause. The Court confirmed in *Lopez* that the proper inquiry is whether the activity at issue -- whatever its character -- "substantially affect[s]" interstate commerce. *Lopez*, 514 U.S. at 559; see *supra* at 26-28.

Third, the rigid and formalistic test adopted by the Fourth Circuit would deprive the national government of the latitude and flexibility to provide national solutions. Congress' ability to address serious future national problems -- even if the states themselves were not able to address them -- would depend entirely on whether the activity Congress proposed to regulate is characterized as "economic." Such an inflexible test could seriously compromise the ability of the national government to fulfill its intended functions. Cf. *New York*, 505 U.S. at 157 ("the powers conferred upon the Federal Government by the Constitution were phrased in language broad enough to allow for the expansion of the Federal Government's role"). As Judge Friendly explained,

> The genius of the Framers lay in devising a unique form of federalism -- one in which a national government was authorized to act directly on the people within the powers

> confided to it rather than solely on the states, and *was endowed with an amplitude of powers which might or might not be used as the future would dictate.*

Henry J. Friendly, *Federalism: A Foreword*, 86 Yale L.J. 1019, 1019 (1977) (emphasis added).

Rigid, bright line judicial rules limiting congressional power ignore the fundamental wisdom underlying judicial restraint: courts cannot know what the future will hold, and bright line rules, once judicially created, cannot be quickly set aside by a majority in Congress or the electorate. As the Kennedy-O'Connor concurrence explained, the Court "[is] often called upon to resolve questions of constitutional law not susceptible to the mechanical application of bright and clear lines" because of the "political judgment[s particularly involved in resolving] Commerce Clause matters." *Lopez*, 514 U.S. at 579 (Kennedy, J., concurring). Thus: "[t]he history of the judicial struggle to interpret the Commerce Clause . . . counsels *great restraint* before the Court determines that the Clause is insufficient to support an exercise of the national power." *Id.* at 568 (Kennedy, J., concurring) (emphasis added).[15]

The Fourth Circuit's bright line test is fundamentally at odds with a "practical" approach to the commerce power, *id.* at 571-74 (Kennedy, J., concurring). Such a formalistic approach would lead to the very real possibility that *no level of government* could or would address potentially serious national problems. Such an unwise approach to the Commerce Clause was rejected during the New Deal, see, *e.g.*, *North American Co.* v. *SEC*, 327 U.S. 686, 705 (1946) (The "commerce clause does not operate so as to render the nation powerless to defend

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[15] *See generally*, Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (1999) (explaining the value and benefits of incremental adjudication and the pitfalls of jurisprudence that relies on inflexible rules).

itself against economic forces that Congress decrees inimical or destructive of the national economy."), and should not be resurrected.

D. The Fourth Circuit's Facial Invalidation Of The Civil Rights Remedy Was Erroneous.

The Fourth Circuit held the Civil Rights Remedy facially invalid. *Brzonkala*, 169 F.3d at 889. However, a court may hold a federal statute facially invalid *only* if "no set of circumstances exists under which the Act would be valid." *United States* v. *Salerno*, 481 U.S. 739, 745 (1987); see *National Endowment for the Arts* v. *Finley*, 118 S. Ct. 2168, 2175 (1998). The Fourth Circuit's facial invalidation of the Civil Rights Remedy was erroneous because -- even if a direct effect on economic activity were constitutionally required, which it is not -- there are numerous circumstances, including those in this case, in which the statute would be valid. For example, Congress may regulate gender-motivated violence that directly impedes an economic transaction, such as getting a job, receiving paid-for services, or exercising contractual rights. See *Perez*, 402 U.S. at 156-57 (upholding federal statute criminalizing loan-sharking and threatened violence impeding wholly intrastate activity). As the legislative history shows, gender-motivated violence frequently causes women to lose jobs, or to forgo the benefits of services they have purchased or contractual rights. See *supra* at 6-13.

As applied to the facts in this case, the statute is valid, even if a direct effect on economic activity is required. Brzonkala paid tuition, fees, and room and board to attend Virginia Tech in the Fall of 1994. J.A. 27 (Am. Comp., ¶¶ 76-77). Plainly, paying substantial fees for a college education is an economic activity. See, *e.g.*, *United States* v. *Brown Univ.*, 5 F.3d 658, 666 (3rd Cir. 1993) (paying college fees "is a quintessential commercial transaction"). As a direct result of respondents' gender-motivated sexual assault on Brzonkala, she was forced

to withdraw from college and has never received the education she sought. See J.A. 27 (Am. Comp., ¶¶ 76-77). Because Congress unquestionably has the power to protect citizens from gender-motivated violence that, as here, directly interferes with their exercise of contractual and economic rights, the Civil Rights Remedy is valid on its face, and as applied to this case, even if, *arguendo*, it might not constitutionally be applied in some other circumstances.

II. THE CIVIL RIGHTS REMEDY IS CONSTITUTIONAL SECTION FIVE LEGISLATION THAT ENFORCES WOMEN'S EQUAL PROTECTION RIGHTS.

A. Congress Enacted The Civil Rights Remedy To Deter Or Remedy Pervasive Equal Protection Violations.

The VAWA Civil Rights Remedy, enacted pursuant to "[S]ection 5 of theFourteenth Amendment," 42 U.S.C. §13981(a), falls squarely within Congress' authority to enact prophylactic laws that "'deter[] or remed[y] constitutional violations.'" *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Sav. Bank*, 119 S. Ct. 2199, 2206 (1999); *accord City of Boerne* v. *Flores*, 521 U.S. 507, 518-20 (1997). To evaluate the law under Section 5, the Court first must "identify the Fourteenth Amendment 'evil' or 'wrong' that Congress intended to remedy," as "judged with reference to the historical experience . . . it reflects." *Florida Prepaid*, 119 S. Ct. at 2206-07 (citing *Boerne* 521 U.S. at 519-20, 525). In stark contrast to the record in either *Florida Prepaid* or *Boerne*, Congress here identified numerous equal protection violations in state laws and law enforcement practices that reflected a history of "subsisting and pervasive" discriminatory practices that deny women equal protection of the laws. See *Boerne*, 521 U.S. at 525; see *supra* at 13-17.

Just as this Court recognized "the necessity of using strong remedial and preventive measures to respond to the widespread and persisting deprivation of constitutional rights" stemming from this country's history of racial discrimination, see *Boerne*, 521 U.S. at 526, so too did Congress enact the Civil Rights Remedy to help counteract practices motivated by discrimination that persisted at the state level. Indeed, the record supporting the Civil Rights Remedy closely resembles the evidence of equal protection violations supporting enactment of other anti-discrimination legislation under the 14th and 15th Amendments' enforcement clauses.[16] That record documented historic and systemic discrimination despite some remedial laws; statistical disparities in voter registration and statewide office-holding; the ineffectiveness of previous law reform efforts; and discriminatory mistreatment of African-Americans. See *id.* at 525-27 (discussing record held sufficient to support exercise of enforcement clause powers in *South Carolina* v. *Katzenbach*, *City of Rome* v. *United States*, *Oregon* v. *Mitchell*, and *Katzenbach* v. *Morgan*).

The record here is at least as strong. As recounted more fully in Section II, *supra*, Congress identified and responded to this country's long history of discriminatory treatment of women seeking redress for crimes of violence. For example, Congress found that state law enforcement policies and practices treated violence committed against women less seriously than comparable violence directed against men. See *supra* at 14-15. Such differential class-based treatment strikes

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[16] The same framework governs analyses of the enforcement clauses of the 13th, 14th and 15th amendments. *See, e.g., Oregon* v. *Mitchell*, 400 U.S. 112, 127-28 (1970); *South Carolina* v. *Katzenbach*, 383 U.S. 301, 326-27 (1966).

at the heart of the equal protection clause.[17] Congress also sought to remedy the effects of formal barriers to redress such as marital rape[18] and interspousal tort immunities, which Congress found reflected and perpetuated outdated stereotypes.[18] Moreover, state officials' stereotypic treatment of women complainants, exemplified by comments about dress or appearance or declarations that "she asked for it," is conduct this Court consistently has held indicates discriminatory intent.[19]

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[17] *See, e.g., DeShaney* v. *Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 197 n.3 (1989) (noting that the "State may not . . . selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause"); *Balistreri* v. *Pacifica Police Dep't*, 901 F.2d 696, 701 (9th Cir. 1990) (upholding equal protection claim for police discriminatory treatment of domestic violence complaint, reasoning that remarks such as officer's response to domestic violence victim that he "'did not blame plaintiff's husband for hitting her,'" indicate "an intention to treat domestic abuse cases less seriously than other assaults, as well as an animus against abused women"); *Watson* v. *City of Kansas City*, 857 F.2d 690, 696-97 (10th Cir. 1988) (establishing that police policy treating domestic violence claims less seriously than nondomestic violence claims could violate women's equal protection based on proof, *inter alia*, of discriminatory intent consistent with *Personnel Administrator* v. *Feeney*, 442 U.S. 256, 274 (1979)).

[18] Although the Court is not presented with the issue here, several states have struck marital rape exemptions on the ground that they violate the Fourteenth Amendment's equal protection clause. *See, e.g., People* v. *Liberta*, 474 N.E.2d 567, 573 (N.Y. 1984) (striking marital rape law as resting on "archaic notions" and violating equal protection); *see also, e.g., Moran* v. *Beyer*, 734 F.2d 1245, 1248 (7th Cir. 1984) (striking interspousal immunity law as violating equal protection).

[19] *See, e.g., United States* v. *Virginia*, 518 U.S. 515, 541 (1996) (citing *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 725 (1982) (rejecting gender-based classification based on "archaic and stereotypic notions")); *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 250-51, 256 (1989) (recognizing sex stereotyped remarks as evidence of discriminatory motive).

Consistent with its legislative role, Congress was not limited to reviewing adjudicated cases of equal protection violations. See *Turner Broad. Sys.* v. *FCC*, 512 U.S. 622, 665-66 (1994) (plurality opinion) (contrasting legislative with judicial fact-finding); *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 490 (1989) (upholding Congress' Section 5 power to define circumstances that threaten equality).[20] As detailed above, see *supra* at 13-17, the legislative record included evidence that statistical disparities in prosecution and conviction rates for violent crimes against women stemmed from deep-rooted discriminatory attitudes concerning women's credibility and historic acceptance of sexual violence against women. Congress also considered rules and practices requiring proof of corroboration or "utmost resistance" and the continued use of outdated jury instructions, which held the predominantly female victims of sexual assaults to different standards than victim witnesses in other crimes, and reflected stereotypes about women's credibility. These and other examples detailed by state gender bias task force reports documented the unconstitutional "evil or wrong" Congress sought to remedy.

B. The Civil Rights Remedy Is A Congruent And Proportionate Response To The Legislative Record Of Equal Protection Violations.

Congress' enactment of the Civil Rights Remedy as part of its comprehensive VAWA scheme is both proportionate to the violations Congress sought to redress and congruent with previous federal responses to class-based violence States were unable fully to remedy. Because the Civil Rights Remedy directly responds to the violations Congress identified, it falls

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[20] *Accord South Carolina*, 383 U.S. at 330 (approving Congress' reliance on "any probative source" in considering Section 5 legislation); *see also Fullilove* v. *Klutznick*, 448 U.S. 448, 478 (1980) (Upholding Section 5 legislation even absent evidence of intentional discrimination in legislative record).

well within Congress' """wide latitude""" in crafting measures that remedy or prevent unconstitutional acts. *Florida Prepaid*, 119 S. Ct. at 2206 (quoting *City of Boerne*, 521 U.S. at 517); see *Ex parte Virginia*, 100 U.S. 339, 345-46 (1880).

For example, because bias by state officials had barred access to the justice system, the Civil Rights Remedy authorizes a claim that the victim controls. 1990 S. Rep. 42. The availability of federal jurisdiction affords victims the opportunity to be heard by judges who are insulated from local political and other pressures -- a particularly critical factor in smaller communities, where bias may be compounded by familiarity.[21] As a service provider in rural Utah testified, officials in her community "frequently know the perpetrators and/or are related to them" and take the accused "out for coffee" instead of addressing the violence.[22]

Rather than usurping states' authority, Congress carefully crafted the Civil Rights Remedy to avoid any encroachment on areas of traditional state concern. For example, to maintain states' traditional role in adjudicating family law matters, the statute expressly prohibits federal courts from exercising supplemental jurisdiction over divorce and custody actions. Because it requires proof of gender-motivation, the Civil Rights Remedy does not create a "general federal tort law." See *Griffin* v. *Breckenridge*, 403 U.S. 88, 102 (1971) (42 U.S.C. § 1985(3) avoids "constitutional shoals" of a general tort law by requiring proof of discriminatory motivation). Instead, like other federal civil rights laws, the Civil Rights Remedy

[21] 1990 S. Rep. 42. *Accord* 1991 S. Hearing 105 (statement of Cass R. Sunstein) (recognizing federal remedy for gender violence as responsive to bias in state criminal justice system).

[22] Apr. 1993 S. Hearing 61 (statement of Barbara Wood).

vindicates the "unique individual and societal harm" caused by bias-inspired crime. 1993 S. Rep. 50 (citing *Wisconsin* v. *Mitchell*, 113 S. Ct. 2194 (1993)).

Finally, respecting the limits of congressional authority, the Civil Rights Remedy does not effect a substantive transformation of equal protection rights by equating private conduct with equal protection violations. Instead, Congress responded to the discriminatory conduct of state actors. Compare *Boerne* 521 U.S. at 533 (critiquing Religious Freedom Restoration Act for attempting substantive transformation of constitutional law). Having identified constitutional violations, Congress is not limited to prescribing a remedy directed solely at unconstitutional acts. See *Florida Prepaid*, 119 S. Ct. at 2206; *Boerne*, 521 U.S. at 517-18. Nor is Congress limited to remedies that directly regulate state action; modern Supreme Court cases confirm Congress' Section 5 power to enact remedial statutes regulating the conduct of private individuals as a means to prevent state violations from occurring. See *District of Columbia* v. *Carter*, 409 U.S. 418, 424 n.8 (1973) (citing the separate opinions in *United States* v. *Guest*, 383 U.S. 745, 762 (1966) (Clark, J., concurring), referencing Court majority's agreement that Congress may regulate private conduct under Section 5).

This Court never has struck Section 5 legislation extending to private conduct where, as here, Congress enacted the law in response to a documented record of historic discrimination fueling equal protection violations. Two Reconstruction-era decisions striking laws that regulated private conduct cast no doubt on the constitutionality of Congress' actions here. In the *Civil Rights Cases*, the Court struck a public accommodations law that made "no reference whatever to any supposed or apprehended violation of the fourteenth amendment on the part of the states" and was not "corrective legislation" enacted in response to a constitutional violation by state officials. 109

U.S. 3, 13, 14 (1883). In *United States* v. *Harris*, the Court struck a predecessor to 18 U.S.C. § 241 because it rendered "private persons . . . liable to punishment for conspiring to deprive any one of the equal protection of the laws," with no basis in state action. 106 U.S. 629, 639 (1883).

The Civil Rights Remedy is premised on substantive findings of equal protection violations by state actors. Such an alternative to state remedies is particularly appropriate where, as here, Congress responded to an extensive record of bias among the very state institutions entrusted with providing redress to women victimized by violence.

CONCLUSION

The opinion of the Fourth Circuit should be reversed and the case remanded for further proceedings.

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APPENDICES

APPENDIX A

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

UNITED STATES CONSTITUTION

U.S. Const. art. I, § 8, cls. 3, 18.

The Congress shall have Power...

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . . .

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States or in any Department or Officer thereof.

U.S. Const. amend. XIV provides in pertinent part:

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * *

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

FEDERAL STATUTES

28 U.S.C. § 1445. Nonremovable actions

(a) A civil action in any State court against a railroad or its receivers or trustees, arising under sections 1-4 and 5-10 of the Act of April 22, 1908 (45 U.S.C. 51-54, 55-60), may not be removed to any district court of the United States.

(b) A civil action in any State court against a carrier or its receivers or trustees to recover damages for delay, loss, or injury of shipments, arising under section 11706 or 14706 of title 49, may not be removed to any district court of the United States unless the matter in controversy exceeds $10,000, exclusive of interest and costs.

(c) A civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States.

(d) A civil action in any State court arising under section 40302 of the Violence Against Women Act of 1994 may not be removed to any district court of the United States.

(June 25, 1948, c. 646, 62 Stat. 939; July 25, 1958, Pub.L. 85-554, § 5, 72 Stat. 415; Oct. 17, 1978, Pub.L. 95-473, § 2(a)(3)(A), 92 Stat. 1465; Oct. 20, 1978, Pub.L. 95-486, § 9(b), 92 Stat. 1634; Sept. 13, 1994, Pub.L. 103-322, Title IV, § 40302(e)(5), 108 Stat. 1942; Dec. 29, 1995, Pub.L. 104-88, Title III, § 305(b), 109 Stat. 944; Oct. 11, 1996, Pub.L. 104-287, § 3, 110 Stat. 3388.)

42 U.S.C. § 13981. Civil rights

(a) Purpose

Pursuant to the affirmative power of Congress to enact this part under section 5 of the Fourteenth Amendment to the Constitution, as well as under section 8 of Article I of the Constitution, it is the purpose of this part to protect the civil rights of victims of gender motivated violence and to promote public safety, health, and activities affecting interstate commerce by establishing a Federal civil rights cause of action for victims of crimes of violence motivated by gender.

(b) Right to be free from crimes of violence

All persons within the United States shall have the right to be free from crimes of violence motivated by gender (as defined in subsection (d) of this section).

(c) Cause of action

A person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) of this section shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.

d) Definitions

For the purposes of this section—

(1) the term "crime of violence motivated by gender" means a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender; and

(2) the term "crime of violence" means—

(A) an act or series of acts that would constitute a felony against the person or that would constitute a felony against property if the conduct presents a serious risk of physical injury to another, and that would come within the meaning of State or Federal offenses described in section 16 of Title 18, whether or not those acts have actually resulted in criminal charges, prosecution, or conviction and whether or not those acts were committed in the special maritime, territorial, or prison jurisdiction of the United States; and

(B) includes an act or series of acts that would constitute a felony described in subparagraph (A) but for the relationship between the person who takes such action and the individual against whom such action is taken.

(e) Limitation and procedures

(1) Limitation

Nothing in this section entitles a person to a cause of action under subsection (c) of this section for random acts of violence unrelated to gender or for acts that cannot be demonstrated, by a preponderance of the evidence, to be motivated by gender (within the meaning of subsection (d) of this section).

(2) No prior criminal action

Nothing in this section requires a prior criminal complaint, prosecution, or conviction to establish the elements of a cause of action under subsection (c) of this section.

(3) Concurrent jurisdiction

The Federal and State courts shall have concurrent jurisdiction over actions brought pursuant to this part.

(4) Supplemental jurisdiction

Neither section 1367 of Title 28 nor subsection (c) of this section shall be construed, by reason of a claim arising under such subsection, to confer on the courts of the United States jurisdiction over any State law claim seeking the establishment of a divorce, alimony, equitable distribution of marital property, or child custody decree.

(5) Omitted

(Pub.L. 103-322, Title IV, § 40302, Sept. 13, 1994, 108 Stat. 1941.)

APPENDIX B

1994 VIOLENCE AGAINST WOMEN ACT PARTIAL LEGISLATIVE HISTORY*

CONGRESSIONAL REPORTS

S. Rep. No. 101-545 (1990).

Majority Staff of Senate Comm. on the Judiciary, 102d Cong., 1st Sess., *Violence Against Women: The Increase of Rape in America* (Comm. Print 1991).

S. Rep. No. 102-197 (1991).

Majority Staff of Senate Comm. on the Judiciary, 102d Cong., 2d Sess., *Violence Against Women: A Week in the Life of America* (Comm. Print 1992).

S. Rep. No. 103-138 (1993).

Majority Staff of Senate Comm. on the Judiciary, 103d Cong., 1st Sess., *The Response to Rape: Detours on the Road to Equal Justice* (Comm. Print 1993).

H.R. Rep. No. 103-395 (1993).

H.R. Conf. Rep. No. 103-694 (1994).

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* For the Court's convenience, Petitioner provides this listing of major congressional reports, hearings, and related materials concerning the Violence Against Women Act.

HEARINGS

Domestic Violence: Terrorism in the Home: Hearing Before the Subcomm. on Children, Family, Drugs and Alcoholism of the Senate Comm. on Labor and Human Resources, 101st Cong. (1990).

Women and Violence: Hearing on Legislation to Reduce the Growing Problem of Violent Crime Against Women Before the Senate Comm. on the Judiciary, 101st Cong. (1990).

Violence Against Women: Victims of the System: Hearings Before the Senate Comm. on the Judiciary, 102d Cong. (1991).

Violence Against Women: Hearing Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary, 102d Cong. (1992).

Domestic Violence: Hearing on the Need to Concentrate the Fight Against an Escalating Blight of Violence Against Women Before the Senate Comm. on the Judiciary, 103d Cong. (1993).

Violent Crimes Against Women: Hearing Before the Senate Comm. on the Judiciary, 103d Cong. (1993).

Violence Against Women: Fighting the Fear: Hearing Before the Senate Comm. on the Judiciary, 103d Cong. (1993).

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Nos. 99-5 and 99-29

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ANTONIO J. MORRISON, ET AL.

CHRISTY BRZONKALA, PETITIONER

v.

ANTONIO J. MORRISON, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether 42 U.S.C. 13981, the provision of the Violence Against Women Act that creates a private right of action for victims of gender-motivated violence, is a valid exercise of Congress's power under the Commerce Clause of the Constitution.

2. Whether 42 U.S.C. 13981 is a valid exercise of Congress's power under the Enforcement Clause of the Fourteenth Amendment to the Constitution.

PARTIES TO THE PROCEEDING

Petitioner is the United States of America, which intervened in the district court to defend the constitutionality of 42 U.S.C. 13981. Christy Brzonkala was the plaintiff in the district court and an appellant in the court of appeals; she is also a petitioner in this Court.

Respondents are Antonio J. Morrison and James L. Crawford. The Virginia Polytechnic Institute and State University, Cornell D. Brown, and William E. Landsidle, in his capacity as Comptroller of the Commonwealth of Virginia, were defendants/appellees below.

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OPINIONS BELOW

The opinion of the court of appeals sitting en banc (Pet. App. 1a-281a) is reported at 169 F.3d 820. The earlier opinion of a panel of that court (Pet. App. 282a-349a) is reported at 132 F.3d 949. The opinion of the district court (Pet. App. 350a-403a) is reported at 935 F. Supp. 779.

JURISDICTION

The judgment of the court of appeals was entered on March 5, 1999. On May 25, 1999, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including June 30, 1999. The petition was filed on June 25, 1999, and granted on September 28, 1999. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3, provides: "The Congress shall have Power * * * To regulate Commerce * * * among the several States."

2. The Equal Protection Clause of Section 1 of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." Section 5 of the Fourteenth Amendment provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

3. The civil rights provision of the Violence Against Women Act, 42 U.S.C. 13981, is reproduced in an appendix to this brief (App., *infra*, 1a-3a).

STATEMENT

This case presents a constitutional challenge to 42 U.S.C. 13981, the provision of the Violence Against Women Act of 1994 that gives victims of gender-motivated violence a private right of action against their assailants. Section 13981 enables victims to obtain compensation for the lost earnings, medical expenses, and other pecuniary and non-pecuniary losses associated with gender-motivated violence and to obtain other appropriate relief.

Between 1990 and 1994, Congress conducted extensive hearings that revealed that gender-motivated violence is an overwhelming national problem, which substantially affects interstate commerce by impeding the travel, employment, and other economic activities of its victims and potential victims. Congress also found that pervasive bias in the state criminal and civil justice systems has exacerbated the problem and, indeed, has denied victims of gender-motivated violence the equal protection of the laws. Congress therefore concluded that the creation of a private right of action for victims of gender-motivated violence was an appropriate exercise of its authority under the Commerce Clause and the Enforcement Clause of the Fourteenth Amendment. A divided Court of Appeals for the Fourth Circuit held otherwise.

1. Congress enacted the Violence Against Women Act to address "the escalating problem of violence against women." S. Rep. No. 138, 103d Cong., 1st Sess. 37 (1993) (1993 S. Rep.). Congress chose to address that problem through "several different complementary strategies," including new federal crimes, a new federal civil remedy, and new federal grant programs. S. Rep. No. 197, 102d Cong., 1st Sess. 34 (1991) (1991 S. Rep.). The crimes created by the statute punish certain types of interstate domestic violence. See 18 U.S.C. 2261, 2262 (1994 & Supp. III 1997).[1] The grant programs authorized $1.6 billion in federal spending over six years to support state, local, and tribal efforts to reduce violence against women, including rape prevention and education programs, law-enforcement efforts, victim services programs, battered women's shelters, and improved security in public transit. See, *e.g.*, 42 U.S.C. 300w-10, 3796gg, 3796hh, 10409(a), 13931.

Congress considered one of the "[m]ost important[]" components of the Violence Against Women Act to be its civil rights provision, Section 13981, which gives victims of gender-motivated violence a federal cause of action against its perpetrators. 1993 S. Rep. 38. As Congress explained, Section 13981 "makes a national commitment to condemn crimes motivated by gender in just the same way that we have made a national commitment to condemn crimes

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[1] The criminal provisions of the Violence Against Women Act, which are not at issue here, have been uniformly sustained against constitutional challenge by the courts of appeals. See, *e.g.*, *United States* v. *Gluzman*, 154 F.3d 49 (2d Cir. 1998), cert. denied, 119 S. Ct. 1257 (1999); *United States* v. *Wright*, 128 F.3d 1274 (8th Cir. 1997), cert. denied, 523 U.S. 1053 (1998); *United States* v. *Bailey*, 112 F.3d 758 (4th Cir.), cert. denied, 522 U.S. 896 (1997).

motivated by race or religion." S. Rep. No. 545, 101st Cong., 2d Sess. 41 (1990) (1990 S. Rep.).

Section 13981(b) declares that "[a]ll persons within the United States shall have the right to be free from crimes of violence motivated by gender." Section 13981(c), in turn, provides:

> A person * * * who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) of this section [to be free from gender-motivated violence] shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.

Section 13981(d) defines a "crime of violence motivated by gender" that could give rise to such a cause of action. A "crime of violence" is defined as "an act or series of acts that would constitute a felony against the person" (or a felony against property if the conduct poses "a serious risk of physical injury" to a person) under federal or state law and that would satisfy the definition of a "crime of violence" in 18 U.S.C. 16, "whether or not those acts have actually resulted in criminal charges, prosecution, or conviction. 42 U.S.C. 13981(d)(2).[2] Such a crime is "motivated by gender" if it was committed "because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender." 42 U.S.C. 13981(d)(1).

Section 13981(a) expressly invokes two sources of Congress's constitutional authority to create a federal cause

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[2] A "crime of violence" is defined in 18 U.S.C. 16 as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another" or "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

of action for victims of gender-motivated violence: the Commerce Clause and Section 5 of the Fourteenth Amendment.

2. In the Conference Report adopted in connection with the Violence Against Women Act, Congress explained why its commerce power extends to the regulation of gender-motivated violence:

> [C]rimes of violence motivated by gender have a substantial adverse effect on interstate commerce, by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved, in interstate commerce; crimes of violence motivated by gender have a substantial adverse effect on interstate commerce by diminishing national productivity increasing medical and other costs, and decreasing the supply of and the demand for interstate products.

H.R. Conf. Rep. No. 711, 103d Cong., 2d Sess. 385 (1994) (Conf. Rep.).

Congress reached that conclusion after four years of extensive investigation and consideration of the problem of gender-motivated violence. In a series of committee hearings between 1990 and 1994, Congress heard testimony from a variety of experts: state attorneys general, federal and state law-enforcement officials, business and labor representatives, physicians, mental-health professionals, legal scholars, and victims of gender-motivated violence. The evidence presented at those hearings demonstrated to Congress that gender-motivated violence is pervasive, has a substantial effect on interstate commerce, and often goes unremedied because of widespread bias in state justice systems.

a. Congress's extensive fact-finding revealed that violence against women is a problem of the first magnitude and

of national scope. For example, the evidence showed:

- "Violent attacks by men now tops the list of dangers to an American woman's health. Every 15 seconds, a woman is battered and, every 6 minutes, a woman is raped in the United States." 1991 S. Rep. 36.
- "Every week, during 1991, more than 2,000 women were raped and more than 90 women were murdered—9 out of 10 by men." 1993 S. Rep. 38.
- "An estimated 4 million American women are battered each year by their husbands or partners. Approximately 95% of all domestic violence victims are women." H.R. Rep. No. 395, 103d Cong., 1st Sess. 26 (1993) (1993 H. Rep.).
- "Three out of four American women will be victims of violent crimes sometime during their life." *Id.* at 25.[3]

b. The evidence amassed by Congress also demonstrated that violence against women has a substantial impact on interstate commerce. As the 1993 Senate Report explained, "[g]ender-based violence bars its most likely targets—women—from full [participation] in the national economy," by impeding their ability to work, to travel, and to engage in other economic activity. 1993 S. Rep. 54.

Congress was informed that "violent crime against women costs this country at least 3 billion * * * dollars a year." 1990 S. Rep. 33 (citing "partial estimates" of those costs). A significant portion of those costs was attributed to the impact of gender-motivated violence on victims' participation and performance in the workforce. Among victims of rape, for example, "almost 50 percent * * * lose their jobs or are forced to quit in the aftermath of the crime." 1993 S. Rep. 54. Even those who remain employed after the rape may experience a prolonged period of decreased productivity. 1990 S. Rep. 33. Domestic violence likewise "takes its toll in employee absenteeism and sick time for women who either cannot leave their homes or are afraid to show the physical effects of the violence." *Id.* at 37; see *Women and Violence: Hearings Before the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess., Pt. I, at 58 (1990) (*1990 S. Jud. Hearings*) (noting that the costs of employee absenteeism due to domestic violence may reach $3 billion to $5 billion a year).[4]

Congress was also informed that "[e]ven the fear of gender-based violence affects the economy because it deters women from taking jobs in certain areas or at certain hours that pose a significant risk of such violence." 1993 S. Rep. 54. For example, "women often refuse higher-paying night jobs in the service/retail industries because of the fear of attack." *Id.* at 54 n.70. Unfortunately, "[t]hose fears are justified." *Ibid.* (noting that for women, but not for men, the leading cause of death on the job is homicide). For similar reasons, many women refrain from using public transportation, shopping, or going to the movies, particularly after dark. 1991 S. Rep. 38; *1990 S. Jud. Hearings* 109.

c. Congress found that the problem of gender-motivated violence was exacerbated by pervasive bias in state justice systems, including bias among police officers, prosecutors,

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[3] The congressional reports noted that the full extent of the problem is difficult to measure. 1990 S. Rep. 31-32. Estimates indicate that only 50% of rapes and fewer than 10% of sexual assaults are reported. See *Women and Violence: Hearings Before the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess., Pt. 1, at 12 (1990); see also *Violence Against Women: Hearing Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. 6 (1992) (*1992 H. Jud. Hearing*).

[4] The legislative record also identified other ways in which gender-motivated violence affects interstate commerce and the national economy. The cost of medical care for victims of domestic violence, for example, was estimated at more than $100 million a year. *1990 S. Jud. Hearings* 58. And as many as 50% of the women and children who are homeless in this country are fleeing domestic violence. 1990 S. Rep. 37.

judges, juries, and court employees. The Conference Report concluded that "bias and discrimination in the [state] criminal justice system often deprive[] victims of crimes of violence motivated by gender of equal protection of the laws and the redress to which they are entitled." Conf. Rep. 385.

In reaching that conclusion, Congress relied, in part, on the reports compiled by some 20 state task forces on gender bias. The 1991 Senate Report noted that "[s]tudy after study commissioned by the highest courts of the States—from Florida to New York, California to New Jersey, Nevada to Minnesota—has concluded that crimes disproportionately affecting women are often treated less seriously than comparable crimes against men." 1991 S. Rep. 43; see also *id.* at 43 n.40; 1993 S. Rep. 45 n.29, 49 n.52 (citing 20 such studies conducted between 1984 and 1991). The Senate Report found that "[c]ollectively these reports provide overwhelming evidence that gender bias permeates the court system and that women are most often its victims." 1991 S. Rep. 43-44 (quoting Lynn H. Schafran, *Overwhelming Evidence: Reports on Gender Bias In the Courts*, Trial, Feb. 1990, at 28); see also 1993 S. Rep. 49 ("[w]omen often face barriers of law, of practice, and of prejudice not suffered by other victims of discrimination").

For example, the Illinois task force found that there was "a continuing suspicion of the credibility of sexual assault victims on the part of police, prosecutors, judges, and juries." Illinois Task Force on Gender Bias in the Courts, *Gender Bias in the Courts* 16 (1990). Accordingly, "[a]lthough rape is rarely committed before eyewitnesses and is often not reported immediately, prosecutors and investigators seek corroboration, including evidence of a 'prompt complaint.'" *Ibid.* (noting that sexual assault victims, unlike victims of other crimes, had been required by police and prosecutors to take polygraph tests). The Texas task force similarly found that "[w]omen sexual-assault victims are accorded less credibility by the judicial system than victims of other types

of assaults." Texas Gender Bias Task Force, *Final Report* 5 (1994). Women frequently confront the assumption that they invited or precipitated a sexual assault. See, *e.g.*, 1991 S. Rep. 34 (describing how a Vermont probation officer questioned whether a 9-year-old girl was a "true victim" of sexual assault because he had heard that she was a "tramp") (quoting Vermont Supreme Court & Vermont Bar Ass'n, *Report of the Vermont Task Force on Gender Bias in the Legal System* 140 (1991)). Such assumptions are particularly prevalent in cases of acquaintance rape, which police regularly decline to investigate and prosecutors regularly decline to prosecute. *Id.* at 47-48. As a result, "a rape survivor may have as little as a 5-percent chance of having her rapist convicted." 1991 S. Rep. 44.

The state task force reports similarly demonstrated to Congress that "[g]ender bias contributes to the judicial system's failure to afford the protection of the law to victims of domestic violence." 1993 S. Rep. 46. In California, for example, the state task force found that "police officers, district and city attorneys, court personnel, mediators, and judges—the justice system—treated the victims of domestic violence as though their complaints were trivial, exaggerated or somehow their own fault." *Ibid.* (quoting Administrative Office of the Judicial Council of the Courts of California, *Achieving Equal Justice for Women and Men in the Courts* 5 (1993)); see also 1991 S. Rep. 34 (quoting a California judge as stating that a domestic violence victim in his court "probably should have been hit"). In Georgia, a state judge was reported to have "mocked," "humiliated," and "ridiculed" a domestic violence victim who was later killed by her estranged husband. 1991 S. Rep. 34 (quoting Supreme Court of Georgia, *Report on Gender and Justice in the Judicial System* 235 (1991)). And in Maryland, a state judge refused to believe a woman's complaint that her husband had threatened to kill her with his gun "because I don't believe that anything like this could happen to me." *Ibid.*

(quoting Maryland Spec. Jt. Comm., *Gender Bias in the Courts* 2-3 (1989)). The record before Congress demonstrated that such deeply ingrained attitudes often cause police, prosecutors, judges, and other court personnel to treat domestic violence less severely than other sorts of violence. See, *e.g.*, 1993 S. Rep. 41 ("In cases where a comparable assault by a stranger on the street would lead to a lengthy jail [term], a similar assault by a spouse will result neither in arrest nor in prosecution.").

Congress was also informed that state civil remedies for victims of sexual assault and domestic violence often have significant flaws. The 1993 Senate Report noted, for example, that "in many States rape survivors * * * may be forced to expose their private lives and intimate conduct to win a damage award; and * * * in some cases, they may be barred from suit altogether by tort immunity doctrines or marital exemptions." 1993 S. Rep. 55. Accordingly, while sexual assault and domestic violence victims may, "[i]n theory," have certain civil remedies at their disposal, "[i]n practice, few are able to use those remedies." 1991 S. Rep. 44. Indeed, the 1991 Senate Report noted that "[l]ess than 1 percent of all victims have collected damages" against their assailants—a statistic that "belie[s] claims that State laws provide 'adequate' remedies for the victims of these crimes." *Ibid.*

Congress concluded, based on its evaluation of the extensive legislative record, that gender-motivated violence poses a national problem demanding a national response. The state attorneys general concurred: "Our experience as Attorneys General strengthens our belief that the problem of violence against women is a national one, requiring federal attention, federal leadership, and federal funds." *Crimes of Violence Motivated by Gender: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House*

Comm. on the Judiciary, 103d Cong., 1st Sess. 35 (1993) (*1993 H. Jud. Hearing*).[5]

Congress determined that the private right of action provided by Section 13981, together with the other provisions of the Violence Against Women Act, was an appropriate response to that national problem. As the 1993 Senate Report explained, Section 13981's declaration that "[a]ll persons within the United States shall have the right to be free from crimes of violence motivated by gender" would make clear to all Americans—including those in the justice system—that crimes motivated by gender bias are "to be considered as serious as crimes motivated by religious, racial, or political bias." 1993 S. Rep. 38. Moreover, the private right of action in Section 13981 was particularly important because it would "allow survivors an opportunity for legal vindication that the survivor, not the State, controls." 1990 S. Rep. 42.

3. In September 1994, at the time of the events at issue in this case, petitioner Christy Brzonkala was an incoming freshman at Virginia Polytechnic Institute (Virginia Tech). Respondents Antonio Morrison and James Crawford were students at Virginia Tech and members of its football team. Pet. App. 7a-8a, 211a; J.A. 14-15.

Brzonkala alleges that 30 minutes after she met Morrison and Crawford in the dormitory where she resided, the two men pinned her down on a bed and took turns forcibly raping her. Afterwards, Morrison allegedly told Brzonkala, "You

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[5] The quoted statement is contained in a July 22, 1993, letter, signed or concurred in by 38 state attorneys general, that was submitted to the House Judiciary Committee in support of the Violence Against Women Act. *1993 H. Jud. Hearing* 34-36; see also *Violence Against Women: Victims of the System: Hearing Before the Senate Comm. on the Judiciary*, 102d Cong., 1st Sess. 37-38 (1991) (resolution unanimously adopted by National Association of Attorneys General endorsing the 1990 version of the Act). Some state officials opposed the Act. See *1993 H. Jud. Hearing* 77-84 (letter and resolution of Conference of Chief Justices opposing civil remedy provision of the Act).

better not have any f***ing diseases." Subsequently, Morrison allegedly announced publicly in the dormitory's dining hall that "I like to get girls drunk and f*** the s*** out of them." Pet. App. 8a, 211a; J.A. 15-18.

Brzonkala alleges that she became depressed and withdrawn after the assault. She ceased attending classes, attempted suicide, and required psychiatric treatment. She ultimately withdrew from school. Pet. App. 212a-213a; J.A. 17-18.

4. In December 1995, Brzonkala brought this action against Morrison and Crawford, invoking Section 13981. Morrison and Crawford moved to dismiss, arguing that Congress lacked constitutional authority to enact Section 13981 and that Brzonkala failed to state a claim under that statute. The United States intervened to defend the constitutionality of Section 13981. Pet. App. 8a-9a.

The district court granted the motion to dismiss. The court held that Brzonkala had stated a claim under Section 13981 at least against Morrison, and that the constitutional question was therefore presented for decision. Pet. App. 361a-362a. The court then concluded that Congress lacked the constitutional authority to enact Section 13981.

The court held that Section 13981 was not a proper exercise of Congress's power under the Commerce Clause. Pet. App. 369a-382a. The court perceived the statute as not meaningfully distinguishable from the statute struck down in *United States* v. *Lopez*, 514 U.S. 549 (1995), notwithstanding that here, unlike in *Lopez*, Congress made specific findings regarding the connection between the regulated conduct and interstate commerce. Pet. App. 371a.

The court also held that Section 13981 was not a proper exercise of Congress's power to enforce the Fourteenth Amendment. The court recognized that "[s]ome possibility exists that at least part of the states' differential treatment of gender-based violent crimes against women is due to gender discrimination, and so correcting the differential

treatment arising out of gender discrimination is a legitimate Fourteenth Amendment concern." Pet. App. 399a. But the court concluded that "no reasonable possibility exists that [Section 13981] will help remedy this legitimate Fourteenth Amendment concern," because the statute "is tailored to remedy conduct other than the conduct giving rise to the equal protection concern." *Id.* at 399a-400a.

5. A divided panel of the Fourth Circuit reversed. Pet. App. 282a-349a. The court held that Section 13981 was a valid exercise of Congress's power under the Commerce Clause, *id.* at 310a-340a, and thus did not reach the Fourteenth Amendment question. Judge Luttig dissented. *Id.* at 340a-349a.

6. On rehearing en banc, a divided court of appeals affirmed the judgment of the district court, holding that Congress did not have the power to enact Section 13981 under either the Commerce Clause or Section 5 of the Fourteenth Amendment. Pet. App. 1a-281a.

a. Addressing the Commerce Clause question, the court of appeals acknowledged that "[t]he legislative record in this case, considered as a whole, shows that violence against women is a sobering problem and also that such violence ultimately does take a toll on the national economy." Pet. App. 68a. The court likewise recognized that "Congress' specific findings regarding the relationship between gender-motivated violence and interstate commerce * * * depict the manner in which such violence affects interstate commerce." *Ibid.*

The court nonetheless concluded that Section 13981 could not be sustained under Congress's power to regulate activities substantially affecting interstate commerce. The court understood *Lopez* to hold that Congress cannot regulate an activity that substantially affects interstate commerce unless (1) the regulated activity is itself an economic one or (2) the statute includes a jurisdictional element requiring a case-by-case inquiry into the nexus to interstate commerce.

Pet. App. 15a-31a. Because Section 13981 "neither regulates an economic activity nor includes a jurisdictional element," the court concluded that "it cannot be upheld on the authority of *Lopez* or any other Supreme Court holding demarcating the outer limits of Congress' power under the substantially affects test." *Id.* at 31a.

Alternatively, the court held that Section 13981 could not be sustained under the commerce power "[e]ven if these two categories of permissible congressional regulations demarcate not the absolute, but only the presumptive outer limits of congressional power under the substantially affects test." Pet. App. 31a. Noting the *Lopez* Court's admonition that the commerce power cannot be construed in a manner that would "effectually obliterate the distinction between what is national and what is local and create a completely centralized government," *id.* at 33a (quoting *Lopez*, 514 U.S. at 557), the court concluded that Section 13981 presents the same federalism concerns as did the statute in *Lopez*. *Id.* at 31a-51a. In the court's view, Section 13981 could not be upheld without endorsing an unlimited view of the commerce power that would permit Congress to "assume control over the entire field of violent crime, or, for that matter, all crime within all of the States." *Id.* at 89a.

b. The court of appeals also held that Section 13981 could not be sustained as legislation enforcing the Fourteenth Amendment, *i.e.*, legislation remedying bias in state civil and criminal justice systems against victims of gender-motivated violence. The court reasoned that Section 13981 "is invalid, regardless of whether its end is to remedy unconstitutional state action, for the simple reason that it regulates purely private conduct and is not limited to individual cases in which the state has violated the plaintiff's Fourteenth Amendment rights." Pet. App. 125a-126a. The court stated that its conclusion was compelled by *United States* v. *Harris*, 106 U.S. 629 (1883), and the *Civil Rights Cases*, 109 U.S. 3 (1883). Pet. App. 104a-126a.

The court also held that Section 13981 did not satisfy the requirement articulated in *City of Boerne* v. *Flores*, 521 U.S. 507, 520 (1997), of "congruence and proportionality between the [constitutional] injury to be prevented or remedied and the means adopted to that end." First, the court expressed doubt that the legislative record revealed constitutional violations to be remedied. Pet. App. 153a-160a. Although the court acknowledged that the record "does establish that the States enforce and apply certain laws in a manner that may ultimately prevent the victims of gender-motivated violence from obtaining vindication through the criminal or civil systems," the court questioned whether such conduct amounted to "*purposeful* discrimination against women in the enforcement of facially neutral laws that could give rise to an equal protection violation." *Id.* at 153a. Second, the court concluded that Section 13981 was so out of proportion to the constitutional violations that it sought to remedy that it could not be regarded as an effort to enforce the Fourteenth Amendment. *Id.* at 160a-163a.[6]

c. Judge Motz, writing for the four dissenting judges, concluded that Section 13981 was a valid exercise of Cogress's power under the Commerce Clause. Pet. App. 224a-281a. The dissent concluded that Congress had the requisite rational basis, as reflected in the "detailed and extensive" legislative findings and testimony, *id.* at 229a, to determine that "gender-based violence substantially affects interstate

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[6] Chief Judge Wilkinson and Judge Niemeyer, both of whom joined the majority opinion, also wrote separate concurrences. See Pet. App. 168a-189a (Wilkinson, C.J., concurring) (concluding that striking down Section 13981 as exceeding Congress's constitutional authority is not improper judicial activism); *id.* at 189a-209a (Niemeyer, J., concurring) (proposing that in order for a regulation of intrastate activity to be sustained as substantially affecting interstate commerce, "(1) the target of [the regulation] must be interstate commerce, even though it may not be the purpose of the regulation, and (2) the effect that the activity has on interstate commerce must be proximate and not incidental").

commerce," *id.* at 237a. The dissent found no support in *Lopez* for limiting Congress's commerce power to statutes that regulate economic activities or contain a jurisdictional element. *Id.* at 240a-247a.

The dissent also rejected the majority's conclusion that federalism concerns undermined Section 13981, noting that Congress had "explicitly found that the states refused or were unable to deal effectively with the problems created by gender-based violence." Pet. App. 232a. Thus, the dissent explained, Section 13981 "provides a necessary national remedy for a severe problem that the states have, by their own admission, been unable to address effectively." *Id.* at 278a. The dissent therefore concluded that Section 13981, in contrast to the statute in *Lopez*, did not "add[] a redundant layer of federal regulation in an area where most states had already acted," but instead "responded to the states' self-described needs." *Id.* at 276a.

SUMMARY OF ARGUMENT

After four years of investigation, Congress determined that violence against women is pervasive in modern American society to a degree that had previously been unrecognized. Congress found that the problem has been exacerbated by the States' failure to treat violent crimes that primarily victimize women, such as rape and domestic abuse, as seriously as other violent crimes. In addition, Congress found that the problem not only devastates the lives of its victims, but also harms the national economy and interstate commerce in many ways. Based on those findings, Congress exercised its powers under the Commerce Clause and the Enforcement Clause of the Fourteenth Amendment to enact Section 13981, a private right of action that enables victims of gender-motivated violence to seek redress against their assailants. Congress acted well within its constitutional authority in doing so.

1. Section 13981 is an appropriate exercise of Congress's power under the Commerce Clause. Congress had far more than the rational basis that this Court has required to conclude that gender-motivated violence substantially affects interstate commerce. Congress found that gender-motivated violence burdens the national economy and interstate commerce in several distinct ways: by deterring women from seeking jobs, including jobs in interstate businesses, that would require them to work at certain hours or in certain places; by inhibiting women from traveling, interstate as well as intrastate, and from engaging in other economic activity; by impeding victims' ability to work at all, or to work productively, thereby forcing many into dependence, poverty, and even homelessness; and by imposing increased medical and other costs on victims, their employers and insurers, and state and local governments. All of those burdens were documented in the extensive legislative record. Congress reviewed that record with the understanding that the Commerce Clause had long been regarded as an appropriate source of constitutional authority to regulate activity that creates a barrier to the participation of particular groups in the Nation's commerce. See, *e.g.*, *Katzenbach* v. *McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241 (1964).

Contrary to the court of appeals' reasoning, Congress's commerce power is not confined to the regulation of those intrastate activities that are "commercial" or "economic" in nature. It is not the character of the activity, but the substantiality of its impact on interstate commerce, that determines whether the activity may be regulated under the Commerce Clause. As Justices Kennedy and O'Connor suggested in their concurring opinion in *United States* v. *Lopez*, 514 U.S. 549, 580 (1995), when Congress exercises its commerce power where "neither the [regulated] actors nor their conduct has a commercial character," the regulation might be sustained if it does not "intrude upon an area of tradi-

tional state concern." Nor is Section 13981 unconnected to economic activity. The gender-motivated violence remedied by Section 13981 occurs at, or en route to, workplaces, retail establishments, and interstate transportation terminals as well as in other settings; in addition, Section 13981 is directed not only at gender-motivated violence itself, but also at the inadequate state mechanisms for compensating victims for its economic consequences.

Section 13981 does not, as the court of appeals suggested, present the federalism concerns that were presented by the statute at issue in *Lopez*. First, Section 13981 is an exclusively civil remedy that enables victims of gender-motivated violence to seek redress against their assailants—a remedy that supplements, but does not supplant, any remedy that the victims may have under state law. It does not intrude into the operations of state government, operate against the States, or conscript the States or state officials in its enforcement. Second, Section 13981 was intended as, and patterned after, federal civil rights legislation. The vindication of civil rights has long been recognized to be a paradigmatic national responsibility, not one that has been primarily left to the States. Third, Congress enacted Section 13981 to address a problem that, as the States acknowledged, their own justice systems had failed adequately to address. A statute premised on such systemic state failures does not presage an open-ended expansion of federal power into domains properly reserved to the States. Finally, the Violence Against Women Act, of which Section 13981 is a part, is a prototypical example of cooperative federalism. It contains a number of provisions designed to encourage and enhance the States' own efforts to address gender-motivated violence. Section 13981, especially when viewed in the context of the entire Act, poses no threat to federalism principles.

2. Section 13981 is also an appropriate exercise of Congress's power under Section 5 of the Fourteenth Amendment to remedy and deter violations of the Equal Protection

Clause. Congress, employing its unique institutional ability to investigate and assess whether legislation is needed to enforce constitutional guarantees, found that pervasive bias in the state justice systems denies victims of gender-motivated violence the equal protection of the laws. Congress based that determination on an extensive record documenting that inaccurate stereotypes about gender-motivated violence and its victims—reflected in state laws, state evidentiary rules, and, especially, the attitudes of police, prosecutors, judges and other state actors—have caused violent crimes motivated by gender animus to be treated less seriously than other violent crimes. It is well-settled that state action based on inaccurate stereotypes, including stereotypes relating to gender, may violate the Equal Protection Clause. Congress was entitled to invoke its authority under Section 5 to remedy such violations.

Section 13981 is a suitable remedy for the constitutional violations that Congress identified. As Congress explained, Section 13981 gives victims of gender-motivated violence "an opportunity for legal vindication," in either federal or state court, "that the [victim], not the State, controls." 1990 S. Rep. 42. Section 13981 thus remedies and prevents the discrimination that victims of gender-motivated crimes often face in the state justice systems by giving them an alternative means of obtaining legal redress. Congress's broad enforcement authority under Section 5 is not limited, as the court of appeals believed, to the creation of remedies against the States themselves. A remedy that permits victims of gender-motivated violence to seek the vindication withheld by the States is a wholly permissible means of effectuating the purposes of the Fourteenth Amendment.

Section 13981 is fully consistent with this Court's decisions addressing the scope of Congress's power to enforce the Fourteenth Amendment. Section 13981 is unlike the statutes in this Court's Reconstruction-era decisions, which were predicated on the assumption that private conduct may

violate the Equal Protection Clause. Those decisions do not bar Congress from reaching the conduct of private persons, when Congress does so to remedy discrimination by the State or its agents. Nor does Section 13981 suffer from the defects that the Court perceived in *City of Boerne* v. *Flores*, 521 U.S. 507 (1997). Section 13981, unlike the statute in that case, provides a remedy that is congruent and proportional to the constitutional violations that Congress identified. Section 13981 does not redefine the substantive prohibitions of the Fourteenth Amendment. To the contrary, Section 13981 provides an additional remedy for state action that Congress reasonably found would violate equal protection under the standards announced by this Court. And, in contrast to the situation in *Flores*, Section 13981 is an appropriately limited remedy that does not intrude into the operations of state government.

ARGUMENT

I. SECTION 13981 IS A VALID EXERCISE OF CONGRESS'S POWER UNDER THE COMMERCE CLAUSE

Congress rationally determined that gender-motivated violence imposes a substantial burden on interstate commerce, impeding its victims' efforts to work, travel, and engage in other economic activity. Section 13981 is specifically designed to address the economic consequences of gender-motivated violence by providing victims a means of recovering their lost earnings, medical expenses, and other pecuniary and non-pecuniary losses. Section 13981, as a private civil remedy, does not interfere with the activities of the States. Indeed, Section 13981 was adopted in response to Congress's determination, concurred in by a substantial majority of state attorneys general, that the problem of gender-motivated violence required a comprehensive national

solution. Section 13981 is thus a proper exercise of Congress's power under the Commerce Clause.

A. Congress Rationally Found That Gender-Motivated Violence Imposes A Substantial Burden On Interstate Commerce

1. This Court has repeatedly recognized that Congress's commerce power, while not unlimited, is nonetheless "broad and sweeping." *Katzenbach* v. *McClung*, 379 U.S. 294, 305 (1964); accord, *e.g.*, *Wickard* v. *Filburn*, 317 U.S. 111, 127-128 (1942); *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824); cf. *United States* v. *Lopez*, 514 U.S. 549, 568 (1995) (Kennedy, J., concurring) ("the Commerce Clause grants Congress extensive power and ample discretion to determine its appropriate exercise"). "The fundamental principle is that the power to regulate commerce is the power to enact all appropriate legislation for its protection and advancement; to adopt measures to promote its growth and insure its safety; to foster, protect, control and restrain." *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 36-37 (1937) (internal quotation marks and citations omitted).

It is thus well-settled that Congress's power over interstate commerce "is not confined to the regulation of commerce among the States." *United States* v. *Darby*, 312 U.S. 100, 118 (1942). Congress also may regulate "those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce." *Ibid.*; accord, *e.g.*, *Perez* v. *United States*, 402 U.S. 146, 154 (1971); *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241, 258 (1964); *Wickard*, 317 U.S. at 125.[7]

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[7] The power to regulate intrastate activity that has a substantial effect on interstate commerce is confirmed by Congress's constitutional authority "[t]o make all Laws which shall be necessary and proper for

The modern Court has consistently applied "the traditional rationality standard of review" to assess whether a statute is a permissible exercise of Congress's commerce power, "defer[ring] to a congressional finding that a regulated activity affects interstate commerce 'if there is any rational basis for such a finding.'" *Preseault* v. *ICC*, 494 U.S. 1, 17 (1990) (quoting *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276 (1981)). The Court has thus explained that, "where we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end." *McClung*, 379 U.S. at 303-304; see also *Polish Alliance* v. *NLRB*, 322 U.S. 643, 650 (1944) (Frankfurter, J.) (whether activity sufficiently affects interstate commerce requires "a practical judgment," the exercise of which "the Constitution entrusts primarily and very largely to the Congress, subject to the latter's control by the electorate"). While the Court in *Lopez* identified a zone of "truly local" activity that is not subject to regulation under the Commerce Clause, the Court adhered to the principle that Congress's judgments in this area are entitled to deference. See *Lopez*, 514 U.S. at 557 (citing cases); see also *id.* at 568 (Kennedy, J., concurring) (counseling "great restraint before the Court determines that the [Commerce] Clause is insufficient to support an exercise of the national power").

2. Congress expressly invoked the Commerce Clause as a source of its constitutional authority to enact Section 13981, stating that the private right of action was designed, among other things, "to promote * * * activities affecting

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carrying into Execution" its enumerated powers. Art. I, § 8, Cl. 18. See *New York* v. *United States*, 505 U.S. 144, 158-159 (1992) ("The Court's broad construction of Congress' power under the Commerce * * * Clause[] has, of course, been guided * * * by the Constitution's Necessary and Proper Clause.").

interstate commerce." 42 U.S.C. 13981(a). The Conference Report on Section 13981 sets forth Congress's findings that "crimes of violence motivated by gender have a substantial adverse effect on interstate commerce" in several specific respects. Conf. Rep. 385. Congress arrived at that conclusion after four years of study, as reflected in the extensive hearings and committee reports, which documented the economic impact of gender-motivated violence. Congress reviewed that record with the understanding that the Commerce Clause had long been regarded as an appropriate source of constitutional authority to regulate forms of discrimination that impede the participation of particular groups in the national economy. See, *e.g.*, 1993 S. Rep. 54-55 & n.71 (concluding that "[t]here is no doubt that the Congress has the power to create [Section 13981] under the Constitution's Commerce Clause" based on "precisely the rationale on which the Supreme Court relied in upholding the 1964 Civil Rights Act" in *Heart of Atlanta Motel* and *McClung*).

The Conference Report, the committee reports, and the hearing records demonstrate that Congress had far more than a rational basis to find that gender-motivated violence imposes a substantial burden on interstate commerce by impeding the participation of its victims, primarily women, in the national economy. We focus here on five aspects of that burden.

First, Congress found that gender-motivated violence "diminish[es] national productivity." Conf. Rep. 385. Victims of gender-motivated violence are often unable to work, or to work productively, as a result of their physical injuries and emotional distress. See *Violence Against Women—Victims of the System: Hearing Before the Senate Comm. on the Judiciary*, 102d Cong., 1st Sess. 241 (1991) (*1991 S. Jud. Hearing*) (president of the National Federation of Business and Professional Women notes that victims of domestic violence "either forego employment opportunities available or jeopardize their current employment by absenteeism and

poor work performance"). Congress was informed that the cost of employee absenteeism due to domestic violence alone has been estimated at between $3 billion and $5 billion annually. *1990 S. Jud. Hearings* 58. A significant portion of those costs are borne by employers engaged in interstate commerce.[8]

The record before Congress also demonstrated that rape, like domestic violence, exacts a significant toll in the workplace. For example, "almost 50 percent of rape victims lose their jobs or are forced to quit because of the crime's severity." 1991 S. Rep. 53. Even those who remain employed after a rape or other crime of violence may experience a prolonged period of decreased productivity. 1990 S. Rep. 33.

Second, Congress found that gender-motivated violence deters potential victims "from engaging in employment in interstate business." Conf. Rep. 385. Congress was informed that women refrain from "taking jobs in certain areas or at certain hours that pose a significant risk of such violence." 1993 S. Rep. 54. For example, "women often refuse higher-paying night jobs in the service/retail industries because of the fear of attack." *Id.* at 54 n.70. Such fears are well-founded. *Ibid.* (noting that homicide is the leading cause of job-related death among women but not among men).[9]

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[8] The testimony specifically noted the impact of domestic violence on the productivity of two major corporations engaged in interstate commerce: Polaroid Corporation and E.I. DuPont de Nemours & Company. See *Hearing on Domestic Violence: Hearing Before the Senate Comm. on the Judiciary*, 103d Cong., 1st Sess. 16 (1993) (*1993 S. Jud. Hearing*) (noting Polaroid employees' "tardiness, poor job performance, increased medical claims [and] interpersonal conflicts in the workplace" as a result of domestic violence); *1990 S. Jud. Hearings* 58 (noting DuPont's need to develop programs to deal with the domestic violence that affected many of its employees).

[9] See also, *e.g.*, *1991 S. Jud. Hearing* 86 (testimony of Professor Burt Neuborne) (Women "tend to choose their jobs with one eye looking over

Third, Congress found that gender-motivated violence "deter[s] potential victims from traveling interstate." Conf. Rep. 385. For example, women are reluctant to use public transportation, particularly after dark, because of the fear of attack. 1991 S. Rep. 38 (noting that nearly 50% of the women questioned in one survey stated that they did not use public transportation alone after dark).[10] The use of public transportation, even for relatively short distances, may entail travel across state lines.[11]

Fourth, Congress found that gender-motivated violence deters victims and potential victims from "transacting with business, and in places involved, in interstate commerce," and thereby "decreas[es] the supply of and the demand for interstate products." Conf. Rep. 385; see also 1993 S. Rep. 54 ("[g]ender-based crimes and the fear of gender-based crimes * * * restrict[] consumer spending"). The record before Congress indicated that "as many as 50 percent of homeless women and children are fleeing domestic violence." 1990 S. Rep. 37. A woman in such reduced circumstances is unable to purchase the products, including those that have moved in

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their shoulder about their safety. They can't work late like men can work; they can't work overtime; they can't take jobs in localities that are considered to be dangerous.").

[10] See also, *e.g.*, *1990 S. Jud. Hearings*, Pt. 2, at 80 (letter from International Union, United Automobile Workers of America) ("The threat of violence has made many women understandably afraid to walk our streets or use public transportation.").

[11] See, *e.g.*, *Hess* v. *Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 33 (1994) (noting the "commuter railroad connecting New York City to Northern New Jersey"); *Washington Metro. Area Transit Auth.* v. *Johnson*, 467 U.S. 925, 927 (1984) (noting the "rapid transit system (Metro) for the District of Columbia and the surrounding metropolitan region" of Maryland and Virginia).

interstate commerce, that she would otherwise purchase for herself and her children.[12]

Women also modify their spending behavior in order to avoid gender-motivated violence. For example, of the women who participated in one survey that was before Congress, three-quarters reported that they never go out alone at night to see a movie because they fear rape and other violent crimes. 1991 S. Rep. 38.[13] See also *1990 S. Jud. Hearings* 109 (observing that women in certain neighborhoods "can't walk down to the convenience store" at certain hours because of the threat of violence).

Finally, Congress found that gender-motivated violence affects interstate commerce by "increasing medical and other costs." Conf. Rep. 385. The record before Congress contained estimates that "1 million wom[e]n a year seek medical attention for injuries caused by violence at the hands of a male partner." 1993 S. Rep. 41; see also 1990 S. Rep. 37 (noting that "[a]s many as 20 percent of hospital emergency room cases are related to wife battering"). The costs of that medical care have been placed at more than $100 million a year—costs that are borne by the women themselves, by

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[12] Some victims of domestic violence are reduced to property crimes in order to pay for necessities. See *Domestic Violence: Terrorism in the Home: Hearing Before the Subcomm. on Children, Family, Drugs and Alcoholism of the Senate Comm. on Labor and Human Resources*, 101st Cong., 2d Sess. 30 (1990) (noting that a substantial portion of the women inmates in the Massachusetts prison system are domestic violence victims who were prosecuted for writing bad checks to pay for shelter, groceries, and children's clothing); cf. *Perez*, 402 U.S. at 156 (noting that Congress's determination that extortionate credit transactions affect interstate commerce was based, in part, on evidence that "the loan shark racket * * * coerces its victims into the commission of crimes against property").

[13] Cf. *United States* v. *Shubert*, 348 U.S. 222, 226 (1955) (recognizing that the production, distribution, and exhibition of motion pictures are activities that involve interstate commerce for purposes of the Sherman Act) (citing cases).

employers and insurers, and by state and local governments. *1990 S. Jud. Hearings* 58.[14]

3. The burden that Congress found to be imposed on interstate commerce by gender-motivated violence is analogous, in three significant respects, to the burden that Congress found to be imposed on interstate commerce by racial discrimination in places of public accommodation. This Court held in *McClung* and *Heart of Atlanta Motel* that such a burden is sufficient to justify congressional action under the Commerce Clause.[15]

The Court reasoned that Congress could rationally have found that racial discrimination by restaurants, as in *McClung*, and by hotels and motels, as in *Heart of Atlanta Motel*, "obstructs interstate commerce" by "discouraging travel on the part of a substantial portion of the Negro community." *McClung*, 379 U.S. at 300; *Heart of Atlanta Motel*, 379 U.S. at 253. Similarly, here, Congress rationally found that gender-motivated violence deters many women from traveling interstate. Conf. Rep. 385.

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[14] Cf. *Summit Health, Ltd.* v. *Pinhas*, 500 U.S. 322, 329 (1991) (recognizing that a conspiracy that affects a hospital's "purchases of out-of-state medicines and supplies as well as its revenues from out of state insurance companies would establish the necessary interstate nexus" for purposes of the Sherman Act) (internal quotation marks and citations omitted).

[15] Although the provisions of the Civil Rights Act of 1964 at issue in *Heart of Atlanta Motel* and *McClung* contain a jurisdictional element (*e.g.*, a restaurant is subject to the statute only if it "serves or offers to serve interstate travelers or a substantial portion of the food which it serves * * * has moved in commerce," 42 U.S.C. 2000a(c)), the existence of those elements was not central to the Court's analysis in either case. The Court instead focused on whether the underlying regulated activity, the denial of service on account of race, sufficiently affected interstate commerce. See, *e.g.*, *McClung*, 379 U.S. at 304-305 (observing that "[t]he absence of direct evidence connecting discriminatory restaurant service with the flow of interstate food * * * is not, given the evidence as to the effect of such practices on other aspects of commerce, a crucial matter").

In addition, the Court reasoned in *McClung* that Congress could rationally have found that racial discrimination caused blacks to spend less money at restaurants, which, in turn, caused the restaurants to sell less food and, consequently, to buy fewer goods from their out-of-state suppliers. 379 U.S. at 299-300. Similarly, here, Congress rationally found that gender-motivated violence results in reduced spending by women on a variety of consumer products that have moved, or the components of which have moved, in interstate commerce. Conf. Rep. 385.

The Court finally reasoned in *McClung* that Congress could rationally have found that racial discrimination in places of public accommodation burdened interstate commerce in yet another way: It "deterred professional, as well as skilled, people from moving into areas where such practices occurred and thereby caused industry to be reluctant to establish there," 379 U.S. at 300, presumably out of concern about its ability to attract employees and customers. Similarly, here, Congress rationally found that gender-motivated violence deters women from "taking jobs in certain areas or at certain hours" as well as from patronizing businesses in certain areas or at certain hours. 1993 S. Rep. 54. And that could, as in *McClung*, affect businesses' decisions concerning such matters as interstate relocation and expansion.

In sum, for many of same reasons this Court articulated in *McClung* and *Heart of Atlanta Motel*, Congress "had a rational basis for finding that [gender-motivated violence] had a direct and adverse effect on the free flow of interstate commerce." *McClung*, 379 U.S. at 304. Section 13981, as a statute directed at "the resolution of what the Congress found to be a national commercial problem of the first magnitude," *id.* at 305, is thus an appropriate exercise of the commerce power.

4. This Court's conclusion in *Lopez* that the Gun-Free School Zones Act of 1990 (GFSZA), Pub. L. No. 101-647, Title XVII, § 1702, 104 Stat. 4844, did not possess the requisite nexus to interstate commerce does not suggest the same conclusion with respect to Section 13981. Whereas the connection between gun possession near schools and interstate commerce in *Lopez* was both attenuated in fact and unarticulated by Congress, see 514 U.S. at 562,[16] the connection between gender-motivated violence and interstate commerce is both direct and expressly established in Congress's findings and the supporting legislative record.

As the Court explained in *Lopez*, such congressional findings are particularly significant where, as here, the connection between the regulated activity and interstate commerce may not be "visible to the naked eye." 514 U.S. at 563. Indeed, the problem of gender-motivated violence, as well as its impact on the national economy, has long been overlooked. See 1991 S. Rep. 38 (noting the "faulty statistical measures" of, and the public blindness to, violent crimes against women). Women have often been shamed into silence about rape, domestic abuse, and other violent crimes —and the impact of such crimes upon their lives—because of the attitudes of society generally and of the police, prosecutors, and court personnel assigned to deal with such crimes. See, *e.g.*, 1990 S. Rep. 33-34. Congress's findings with respect to Section 13981 reveal both the extent of the underlying problem and its substantial effect on interstate commerce.

Unlike in *Lopez*, then, the Court need not "pile inference on inference," 514 U.S. at 567, in order to sustain Section 13981. To the contrary, in order to invalidate Section 13981,

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[16] After the Fifth Circuit invalidated the GFSZA for want of findings, Congress amended the statute to add findings about the effect on commerce of gun possession near schools. See 514 U.S. at 563 n.4. Those findings were not based upon a legislative record, however; the government did not rely upon the findings in defending the statute, and this Court did not address or even describe the findings. *Ibid.*; see *id.* at 612 n.2 (Souter, J., dissenting) (dismissing "these particular afterthoughts" as "conclusory").

the Court would have to set aside Congress's express findings of a direct nexus between gender-motivated violence and interstate commerce.

B. Congress May Regulate Activities That Have A Substantial Effect On Interstate Commerce, Whether Or Not Those Activities Are "Commercial" In Nature

The court of appeals concluded that, even if gender-motivated violence substantially affects interstate commerce, Section 13981 cannot be sustained under the Commerce Clause, for either of two alternative reasons. Neither one is correct. First, the court read *Lopez* to permit Congress to regulate intrastate activities that substantially affect commerce only if a further condition is satisfied: either the activities themselves must be commercial in nature or the statute must contain a jurisdictional element that requires proof of a nexus to interstate commerce in each case. The court concluded that Section 13981 satisfied neither requirement. Pet. App. 15a-31a.[17] The court's reasoning reflects a fundamental misunderstanding of the commerce power and *Lopez*.

In *Lopez*, this Court observed that the GFSZA neither regulated a commercial activity nor contained a jurisdictional element. *Lopez*, 514 U.S. at 551, 561-562. The Court did not treat those features as dispositive, however. To the contrary, the Court reaffirmed that "[e]ven if [an] activity be local and *though it may not be regarded as commerce*, it may still, whatever its nature, be reached by Congress if it exerts a substantial effect on interstate commerce." *Id.* at 556 (quoting *Wickard*, 317 U.S. at 125) (emphasis added); see also *id.* at 559 ("the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce"). The Court then proceeded to evaluate, at some length, whether the regulated activity in that case had the requisite effect on interstate commerce. See *id.* at 562-568.

[17] The court of appeals' second rationale was that Section 13981 undermined federalism principles in the same manner as did the GFSZA in *Lopez*. That aspect of the court's decision is discussed in Part C below.

Nor did Justice Kennedy's concurrence, which was joined by Justice O'Connor, propose to restrict Congress's commerce power to the regulation of commercial activity. Instead, the concurrence explicitly presumed that Congress may, in some circumstances, regulate non-commercial activity. The concurrence urged only that if "neither the [regulated] actors nor their conduct has a commercial character, and neither the purposes nor the design of the statute have an evident commercial nexus," then a court should "inquire whether the exercise of national power seeks to intrude upon an area of traditional state concern." 514 U.S. at 580.

Lopez thus did not upset the Court's understanding that "[i]t is the effect upon interstate commerce or upon the exercise of the power to regulate it, *not the source of the injury* which is the criterion of Congressional power" under the Commerce Clause. *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, 121 (1942) (emphasis added); accord *Jones & Laughlin Steel*, 301 U.S. at 32. Indeed, the *Lopez* Court cited, without any suggestion of disapproval, earlier decisions sustaining Congress's power under the Commerce Clause to regulate activity because of its effect on commerce, without considering whether the activity itself was fairly characterized as commercial. See *Lopez*, 514 U.S. at 557, 559-560 (citing *Wickard*, *McClung*, and *Heart of Atlanta Motel*). In *Wickard*, for example, the underlying activity was an individual farmer's cultivation of wheat for his family's personal consumption; in *Heart of Atlanta Motel* and *McClung*, the underlying activity was individual business owners' refusal to serve potential customers on the basis of their race. The Court's analysis in those cases did not address whether the underlying activity was sufficiently commercial to justify regulation under the Commerce Clause. It instead focused on whether the underlying activity, whether

commercial or not, could be found to have the requisite effect on interstate commerce. See *Heart of Atlanta Motel*, 279 U.S. at 257 (recognizing that the correct inquiry is whether the underlying activity, even if "a moral problem," has a "disruptive effect * * * on commercial intercourse").

In any event, the underlying activity at which Section 13981 is directed has an economic component. Section 13981 is designed to remedy gender-motivated violence that occurs at, or en route to, workplaces, retail establishments, and interstate transportation terminals as well as in other settings. See, *e.g.*, 1993 S. Rep. 54 n.70 (noting the risk of violence to women employed in night jobs). And Section 13981 is designed to remedy not only gender-motivated violence itself but also the inadequate existing mechanisms to compensate the victims of such violence for their economic injuries, such as lost earnings, medical expenses, and relocation costs. See, *e.g.*, 1991 S. Rep. 44 (concluding that the fact that "less than 1 percent of all victims have collected damages" against their assailants "belie[s] claims that State laws provide 'adequate' remedies for the victims of these crimes"). Accordingly, even if Congress were limited after *Lopez* to regulating intrastate activity that has some economic component, Section 13981 would come within that limitation.

C. Section 13981 Does Not Present The Federalism Concerns That Were Central To The *Lopez* Decision

The court of appeals' second rationale for concluding that Section 13981 was not a valid exercise of Congress's authority under the Commerce Clause rested on federalism concerns. The court reasoned that Section 13981, like the GFSZA in *Lopez*, could not be sustained without endorsing an unlimited expansion of the commerce power. See Pet. App. 31a-51a. The court failed to recognize critical differences between the two statutes that render Section 13981 an

appropriate, and appropriately limited, exercise of congressional authority within our federal system.

The GFSZA, as the Court emphasized in *Lopez*, was a criminal statute. 514 U.S. at 561. It thus intruded into an area in which "the States possess primary authority"—"defining and enforcing the criminal law." *Id.* at 561 n.3; see also *id.* at 564 (noting that the "states historically have been sovereign" in the areas of "criminal law enforcement" and education). The Court explained that the statute consequently had two deleterious effects on the federal-state balance. In the many States that had already prohibited the possession of guns in or near schools, the GFSZA "effect[ed] a change in the sensitive relation between federal and state criminal jurisdiction," because a crime that was previously prosecuted by the State now would be prosecuted by the United States. *Id.* at 561 n.3 (internal quotation marks omitted). And, in the remaining States that had not chosen to prohibit such conduct, the GFSZA "displace[d] state policy choices," as the United States acknowledged. *Ibid.*; see also *id.* at 583 (Kennedy, J., concurring) (observing that the GFSZA "foreclose[d] the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise").

Section 13981 presents none of the federalism concerns that animated the *Lopez* decision for several reasons:

First, Section 13981, in contrast to the GFSZA, was carefully crafted to avoid intrusions upon areas of traditional state concern. Section 13981 is an exclusively civil remedy that enables victims of gender-motivated violence to seek redress against their assailants—a remedy that supplements, but does not supplant, any remedy that the victims may have under state law. Section 13981 displaces no state law and prohibits no state action. See 42 U.S.C. 13981(d)(2) (incorporating existing federal and state legal standards in defining the conduct that may give rise to liability). Section 13981 does not operate against the States or state officials

and does not conscript the States or state officials in its enforcement.[18]

Section 13981 therefore does not implicate "the sensitive relation between federal and state criminal jurisdiction." *Lopez*, 514 U.S. at 561 n.3. Nor does Section 13981 "foreclose[] the States from experimenting and exercising their own judgment" in responding to the problem of gender-motivated violence. *Id.* at 583 (Kennedy, J., concurring). Accordingly, as 36 state attorneys general observe in their brief amici curiae, Section 13981 "complements state and local efforts to combat violence against women," without "compromising those efforts" or "intruding in an area of traditional state concern." Br. of Arizona et al. 21.

Second, Congress understood Section 13981 to be "civil rights" legislation in the classic sense. 42 U.S.C. 13981(a); see 1990 S. Rep. 41 (Section 13981 "makes a national commitment to condemn crimes motivated by gender in just the same way we have made a national commitment to condemn crimes motivated by race and religion."). To that end, Congress limited the reach of Section 13981 to violence "due, at least in part, to an animus based on the victim's gender," 42 U.S.C. 13981(d)(1), and excluded "random acts of violence unrelated to gender," 42 U.S.C. 13981(e)(1). By targeting gender-motivated violence—which Congress recognized to be "a form of discrimination," not merely "an individual crime or a personal injury," 1993 S. Rep. 51—Congress acted to vindicate civil rights. Cf. *Meritor Sav. Bank* v. *Vinson*, 477 U.S. 57, 64-67 (1986) (holding that severe or pervasive sexual harassment may constitute discrimination in violation of Title VII).

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[18] Section 13981 also precludes supplemental federal jurisdiction over state-law disputes concerning divorce, alimony, equitable distribution of property, and child custody. 42 U.S.C. 13981(e)(4). Nor may an action be removed from state court to federal court based on a claim under Section 13981. 28 U.S.C. 1445(d).

The vindication of civil rights has long been a paradigmatic federal responsibility. See *Heart of Atlanta Motel*, 379 U.S. at 245 (tracing federal civil rights legislation since 1866); see generally *Mitchum* v. *Foster*, 407 U.S. 225, 238-239 & n.29 (1972) (noting that the post-Civil War Amendments and Acts of Congress "constitute[d] the federal government the protector of the civil rights") (quoting J. tenBroek, *The Anti-Slavery Origins of the Fourteenth Amendment* 185 (1951)). It is a responsibility that, to be sure, is shared with the States. But in contrast to general criminal law as involved in *Lopez*, civil rights historically has not been an area in which "the States possess primary authority." *Lopez*, 514 U.S. at 561 n.3.

Third, Congress enacted Section 13981 to address a problem that was caused, in part, by pervasive failures in the States' criminal and civil justice systems. See pp. 7-11, *supra*. Indeed, in urging the adoption of the Violence Against Women Act, including the civil remedy of Section 13981, the States acknowledged that their own efforts to deal with the problem had proved "inadequate." 1993 *H. Jud. Hearing* 34-36. A statute premised on such systemic state failures does not presage an open-ended expansion of federal power into domains properly reserved to the States. As the dissent below explained, "nothing more clearly illustrates the basic difference" between the statutes in this case and *Lopez* than that Section 13981 "responded to the states' self-described needs, while the GFSZA added a redundant layer of federal regulation in an area where most states had already acted." Pet. App. 276a.

If a regulated activity poses a genuine threat to interstate commerce, and the States do not adequately address that threat, federalism principles do not prevent Congress from acting and require the threat to go unanswered. Cf. *North Am. Co.* v. *SEC*, 327 U.S. 686, 705 (1946) ("Th[e] broad commerce clause does not operate so as to render the nation powerless to defend itself against economic forces that Con-

gress decrees inimical or destructive of the national economy."). To the contrary, a "demonstrated state failure" may make federal legislation particularly appropriate. Chief Justice William H. Rehnquist, *The 1998 Year-End Report of the Federal Judiciary* 7 (Jan. 1999) (describing recommendations on how Congress might appropriately balance, in the criminal context, jurisdiction between the state and federal courts); see also *Hodel*, 452 U.S. at 281-282 (sustaining federal environmental standards for intrastate coal mining under the Commerce Clause based, in part, on Congress's finding that the States could be deterred by local economic interests from imposing similarly rigorous standards).

Finally, the Violence Against Women Act, of which Section 13981 is a part, is a prototypical example of cooperative federalism. A major purpose of the Act was to encourage, enhance, and enforce the States' own efforts to address gender-motivated violence. For example, Congress imposed federal penalties for interstate violations of state protection orders (18 U.S.C. 2262 (1994 & Supp. IV 1998)), required that state protection orders be accorded full faith and credit (18 U.S.C. 2265), and provided $1.6 billion in grants over six years to assist state, local, and tribal initiatives to combat gender-motivated violence (42 U.S.C. 300w-10, 3796gg, 3796hh, 10409(a), 13931). All of those provisions, and Section 13981, were endorsed by the States themselves. See *1993 H. Jud. Hearing* 34-36. Accordingly, especially when viewed in the context of the entire Violence Against Women Act, Section 13981 is duly respectful of "the federal balance the Framers designed and that this Court is obliged to enforce." *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring).

II. SECTION 13981 IS A VALID EXERCISE OF CONGRESS'S POWER TO ENFORCE THE FOURTEENTH AMENDMENT

Section 13981 is also a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment to remedy

state action that denies individuals the equal protection of the laws. Congress found that state justice systems routinely treat violent crimes motivated by gender less seriously than other violent crimes—a disparity that Congress attributed to false stereotypes about gender-motivated violence and its victims, as reflected in state laws, state evidentiary rules, and the attitudes of police, prosecutors, judges, and other state actors. Congress rationally determined that Section 13981, which provides a means of seeking redress for gender-motivated violence that the victim, not the State, controls, is an appropriate remedy for such equal protection violations. Contrary to the court of appeals' conclusion, Congress was not limited to providing victims with a remedy against the State itself—an approach that Congress could have perceived to be impractical as to victims, intrusive as to the States, and inconsistent with the spirit of cooperative federalism.

A. Congress Found Sex-Based Discrimination In State Justice Systems, In Violation Of The Equal Protection Clause Of The Fourteenth Amendment, That Warranted Remedial And Preventive Action Under Section 5 Of That Amendment

Section 5 of the Fourteenth Amendment is "a positive grant of legislative power" to Congress. *City of Boerne* v. *Flores*, 521 U.S. at 517 (quoting *Katzenbach* v. *Morgan*, 384 U.S. 641, 651 (1966)). As this Court recently reaffirmed, "[i]t is for Congress in the first instance to 'determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference." *Id.* at 536 (quoting *Morgan*, 384 U.S. at 651); see also *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 490 (1989) (opinion of O'Connor, J.) (Congress's power under Section 5 "may at times also include the power to define situations which *Congress* determines threaten principles of equality").

In seeking to identify conduct that violates the guarantee of equal protection, Congress has "wide latitude" and a markedly different role from the courts. *Flores*, 521 U.S. at 520, 535. Congress has a unique institutional capacity to gather information on a comprehensive basis, unconstrained by the limitations of particular litigation and evidentiary rules, and to draw upon the experiences and expertise of the people and communities represented by its Members.[19] Congress is thus not limited under Section 5 to addressing conduct that courts have determined to be unconstitutionally discriminatory. Rather, Congress may apply this Court's definition of the equal protection right to a set of legislatively determined facts and ascertain, in a way that courts cannot, whether and how often, as an empirical matter, government action entails the "indiscriminate imposition of inequalities." *Romer* v. *Evans*, 517 U.S. 620, 633 (1996).

Congress's determination that "bias and discrimination in the [state] criminal justice system often deprive[] victims of crimes of violence motivated by gender of equal protection of the laws," Conf. Rep. 385, is entitled to considerable deference. The extensive record before Congress, which included the reports of some 20 state task forces on gender bias, demonstrated that "crimes disproportionately affecting women," such as rape and domestic abuse, "are often treated less seriously than comparable crimes against men." 1991 S. Rep. 43; see also 1993 S. Rep. 42.

The principal cause of that disparity, according to the evidence presented to Congress, was "improper stereo-

[19] See *Fullilove* v. *Klutznick*, 448 U.S. 448, 502-503 (1980) (Powell, J., concurring) (Congress, unlike the courts, "has no responsibility to confine its vision to the facts and evidence adduced by particular parties"; instead, Congress has a "broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue."); see also *United States* v. *Gainey*, 380 U.S. 63, 67 (1965) ("significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it").

types" concerning gender-motivated violence and its victims. 1991 S. Rep. 39, 49; see also 1993 S. Rep. 38 (noting the "archaic prejudices" that have caused "those within the justice system" to "blame women for the beatings and the rapes they suffer").[20] Those stereotypes were sometimes reflected in state laws, such as marital rape exceptions and tort immunity doctrines, and state evidentiary rules. The stereotypes were far more often reflected in the attitudes of police officers, prosecutors, judges, and other court personnel. 1993 S. Rep. 55; 1991 S. Rep. 45-48, 53-54. In the State of Washington, for example, the gender-bias task force found that "almost a quarter of the judges believed that rape victims 'sometimes' or 'frequently' precipitate their sexual assaults because of what they wear and/or actions preceding the incidents." 1991 S. Rep. 47 n.63. In Maryland, a judicial commission found that "cases involving domestic violence are regarded [by judges] as trivial or unimportant." 1993 H. Rep. 27. In Georgia, a committee of judges found that "police, prosecutors and judges often have gender-biased attitudes about domestic violence" and that rape "victims receive treatment from police, prosecutors and judges which is adversely affected by gender bias." *Id.* at 27-28. In California, the task force found that "police officers, district and city attorneys, court personnel, mediators, and judges—the justice system—treated the victims of domestic violence as though their complaints were trivial, exaggerated or somehow their own fault." 1993 S. Rep. 46; see also pp. 8-10,

[20] See 1991 S. Rep. 39 (noting that "[w]itnesses testified that stereotypes like 'she asked for it,' 'she made it up,' or 'no harm was done' are frighteningly common"); *id.* at 44 (noting the "suspicion" with which rape victims are treated); *id.* at 47 (noting the pervasive "stereotypes" such as that "people who are raped precipitate [it] in some way, whether it be by dress, having a drink in a bar, accepting a ride in a car or accepting a date").

supra (discussing additional evidence of gender bias in state justice systems).[21]

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[21] The record before Congress contained many other examples of bias against victims of gender-motivated violence in state justice systems. See, *e.g.*, *1990 S. Jud. Hearings*, Pt. 1, at 65 ("Cultural stereotypes of women's role in marriage and in society daily distort courts' application of substantive law. Women uniquely, disproportionately and with unacceptable frequency must endure a climate of condescension, indifference and hostility.") (quoting *Report of the New York Task Force on Women in the Courts*, 15 Fordham Urb. L. J. 11, 17-18 (1986-1987)); *1992 H. Jud. Hearing* 70 (testimony of a Florida assistant state attorney) ("[S]ince many [police] officers consider domestic violence to be a private matter, something other than real crime, the failure to properly investigate the case is tolerated and, in fact, in some departments it is even encouraged."); Connecticut Task Force on Gender, Justice and the Courts, *Report* 103-104 (1991) (3% of state judges surveyed "believe that a husband who hits his wife has usually been nagged or otherwise pushed over the edge by her," 6.6% "believe that a woman deserves what she gets if she stays with a man who batters her," and 20.7% "believe that husbands who force sex on their wives are * * * not really rapists"); Illinois Task Force on Gender Bias in the Courts, *Gender Bias in the Courts* 125 (1990) ("[s]ome criminal justice personnel blame female victims for their exercise of judgment, as though they 'assumed the risk' of sexual assault"); *Final Report of the Iowa Equality in the Courts Task Force* 151 (1993) ("[j]udges may question the character of the [domestic abuse] victim or tend to blame the victim for not leaving the abuser"); Kentucky Task Force on Gender Fairness in the Courts, *Equal Justice for Women and Men* 29 (1992) (the "[j]udicial response to domestic violence" is influenced by "[s]tereotypical attitudes and beliefs," with "a substantial number of judges" still "downplay[ing] the seriousness of domestic violence and manifest[ing] a tendency to side with the husband"); Louisiana Task Force on Women in the Courts, *Final Report* 99-100 n.157 (1992) ("[a]ttempts to blame the victim for the crime are not uncommon," citing examples of such attitudes by a police officer and a judge); *Final Report of the Michigan Supreme Court Task Force on Gender Issues in the Court* 35 (1989) ("attitudes [based on stereotypes] limit the effectiveness of the protection provided by law"); *Final Report of the Rhode Island Committee on Women in the Courts* 36 (1987) ("there are other barriers which prevent victims from obtaining effective relief, barriers created primarily by the attitudes of some judges, court personnel and deputy sheriffs"); Utah Task Force on Gender and Justice, *Report to the Utah Judicial Council* S-15 (1990) (police officers' "[s]tereotypes about men and women" affect their response to domestic violence). Other state task force reports not specifically cited by Congress made similar findings. See, *e.g.*, *Report of the Missouri Task Force on Gender and Justice* 37-38 (1993) ("[a] number of witnesses * * * criticized judges' attitudes and the way they handle domestic violence issues," such as "asking the victims what they had done to provoke their partners to hit them" and even "ask[ing] women in court if they like being beaten"); Texas Gender Bias Task Force, *Final Report* 5 (1994) ("Victims of domestic violence face discriminatory attitudes from law-enforcement personnel, prosecutors, judges, and law-makers. Domestic violence is viewed as less serious than other criminal acts, women's experiences are minimized, victims' credibility often is questioned, and battered women are sometimes blamed for causing the abuse.").

It is well established that state action based on inaccurate stereotypes—and, in particular, stereotypes relating to gender—may violate the Equal Protection Clause of the Fourteenth Amendment. See, *e.g.*, *United States* v. *Virginia*, 518 U.S. 515, 532-533 (1996); *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 725-726 (1982); *Craig* v. *Boren*, 429 U.S. 190, 198-199 (1976); see also *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985) (zoning ordinance that "rest[ed] on an irrational prejudice against the mentally retarded" violated equal protection). Indeed, by the time that Congress was considering the Violence Against Women Act, several lower federal courts had specifically recognized that state actors' failure to treat domestic violence as seriously as other violence may constitute an equal protection violation. See, *e.g.*, *Balistreri* v. *Pacifica Police Dep't*, 901 F.2d 696, 701 (9th Cir. 1990); *Hynson* v. *City of Chester*, 864 F.2d 1026, 1030-1031 (3d Cir. 1988); *Thurman* v. *City of Torrington*, 595 F. Supp. 1521, 1526-1529 (D. Conn. 1984). Here, based on the extensive factual record documenting the States' failure to respond effectively to violent crimes against women due to the "archaic prejudices" of "those within the justice system," 1993 S. Rep. 38, Congress could properly have concluded that violations of equal

protection, under the standard set forth by this Court, were occurring repeatedly in state justice systems across the country.[22]

This is not to suggest that Congress found that any State has, at its highest levels, established a deliberate policy of discriminating against women (or against victims of gender-motivated violence, whom Congress found to be predominantly women). Rather, Congress found, largely on the basis of evidence provided by state task forces and state officials, that many participants in the state justice systems were acting in an intentionally discriminatory manner and that the States' own effort to eliminate such bias had not succeeded and required federal assistance. Such purposeful discrimination by state officials and state employees constitutes state action in violation of the Equal Protection Clause even if it does not implement, and may even violate, state policy. See, *e.g.*, *Hafer* v. *Melo*, 502 U.S. 21, 25 (1991) (actions against state officials in their personal capacities under 42 U.S.C. 1983 based on alleged constitutional violations need not involve a state policy or custom). Congress was entitled to invoke its authority under Section 5 of the Fourteenth Amendment to remedy such violations.[23]

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[22] Congress recognized that many state officials have made efforts to reform their justice systems. But those efforts do not, as the court of appeals appeared to believe (see Pet. App. 155a), make the continuing discrimination by other state actors within the system any less unconstitutional. Congress found that "[d]espite States' most fervent efforts at legislative reform, these stereotypes persist and continue to distort the criminal justice system's response to violence against women." 1991 S. Rep. 39.

[23] Moreover, even if it were not possible to identify any individual state officials or state employees who acted with discriminatory intent, a systemic bias against women, which the States acknowledged but failed to correct, would violate equal protection. Such a systemic bias is not comparable to the inadvertent disparate impact of a nondiscriminatory system as in *Washington* v. *Davis*, 426 U.S. 229 (1976). The systemic bias acknowledged here by the States is necessarily the product of the intentional actions of a multitude of widely dispersed decision-makers. The inability to identify the particular biased actors should not defeat the congressional finding that women have been denied the equal protection of the laws. See *id.* at 241.

B. The Private Right Of Action Created By Section 13981 Is An Appropriate Mechanism To Remedy And Prevent The Constitutional Violations That Congress Identified

Congress has broad discretion under Section 5 of the Fourteenth Amendment in fashioning remedies for violations of constitutional rights. See *Flores*, 521 U.S. at 517-518 ("Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, * * * if not prohibited, is brought within the domain of congressional power.") (quoting *Ex parte Virginia*, 100 U.S. 339, 345-346 (1880)); see also *Morgan*, 384 U.S. at 650 (Section 5 gives Congress "the same broad powers expressed in the Necessary and Proper Clause").

As this Court has made clear, moreover, the question whether Congress may reach particular conduct, in exercising its authority under Section 5, is distinct from the question whether particular conduct violates Section 1. Thus, "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'" *Flores*, 521 U.S. at 518 (quoting *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 455 (1976)); see also *J.A. Croson Co.*, 488 U.S. at 490 (recognizing Congress's power under Section 5 to adopt "prophylactic rules").

The private right of action provided by Section 13981 is an appropriate remedy, and a quintessentially legislative one, for the equal protection violations that Congress found in state justice systems. Section 13981 gives victims of gender-

motivated violence "an opportunity for legal vindication," in federal or state court, that "the [victim], not the State, controls." 1990 S. Rep. 42. Section 13981 thus prevents and remedies the discrimination that victims of gender-motivated crimes often face in state justice systems by giving them an alternative means of obtaining legal redress.[24] And, as explained above (see pp. 33-34 & n.18, *supra*), Section 13981 does so in a manner that does not intrude into the operations of state government.

The court of appeals regarded the unintrusiveness of Section 13981 as a vice, suggesting that Congress's only recourse was to regulate state conduct directly. See Pet. App. 157a. That conclusion has no constitutional basis. A remedy that permits victims of gender-motivated violence to seek the vindication that the States have failed to provide is a wholly permissible means of effectuating the purposes of the Fourteenth Amendment. Section 5 does not confine Congress's broad remedial authority to creating causes of action against States and state officials. Congress could otherwise be limited to remedies that it regarded as ineffective or inappropriate. Congress could conclude, for example, that a cause of action against state officials would undermine the cooperation that the Violence Against Women Act sought to achieve among the national, state, and local governments. And an action of that kind would contravene established principles of prosecutorial immunity.[25]

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[24] Section 13981 prevents discrimination by, *inter alia*, enabling victims of gender-motivated violence to avoid resorting to the state justice systems that, in Congress's judgment, would often treat their complaints in a biased manner. Section 13981 remedies discrimination by, *inter alia*, providing a means of vindication for victims who did resort to state justice systems and who, in Congress's judgment, would often experience bias in those systems.

[25] For similar reasons, Congress could decline to make proof of state discrimination an element of Section 13931's cause of action. Indeed, such proof would have made the federal remedy much more costly and cumbersome for plaintiffs and much more intrusive into state functions. See *Flores*, 521 U.S. at 526 (the "new, unprecedented remedies" of the Voting Rights Act upheld in *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966), "were deemed necessary given the ineffectiveness of the existing voting rights laws * * * and the slow, costly character of case-by-case litigation").

Congress chose instead to proceed affirmatively to address the stereotypes and other barriers that caused States to deny victims of gender-motivated violence the equal protection of the laws. For example, Congress committed $1.6 billion over six years to support state, local, and tribal efforts to reduce violence against women, including funds for "training law enforcement officers and prosecutors to more effectively identify and respond to violent crimes against women" (42 U.S.C. 3796gg(b)(1)) and "educat[ing] judges in criminal and other courts about domestic violence" (42 U.S.C. 3796hh(b)(6)). Congress also sought to combat stereotypes by making clear to all Americans, including participants in state justice systems, that "attacks motivated by gender [bias] [are] to be considered as serious as crimes motivated by religious, racial, or political bias." 1993 S. Rep. 38; see 42 U.S.C. 13981(b) (declaring that "[a]ll persons within the United States shall have the right to be free from crimes of violence motivated by gender"). At the same time, Congress recognized that reform of the state justice systems would take time, and so it gave victims of gender-motivated violence a means of obtaining compensation and vindication that otherwise was often unattainable. Those choices are well within Congress's broad discretion to "determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Flores*, 521 U.S. at 536 (quoting *Morgan*, 384 U.S. at 651).

C. Congress's Exercise Of Its Power Under The Enforcement Clause To Enact Section 13981 Is Consistent With This Court's Decisions

1. The court of appeals, relying on *United States* v. *Harris*, 106 U.S. 629 (1883), and the *Civil Rights Cases*, 109 U.S. 3 (1883), ruled that Section 13981 "is invalid, regardless of whether its end is to remedy unconstitutional state action, for the simple reason that it regulates purely private conduct and is not limited to individual cases in which the state has violated the plaintiff's Fourteenth Amendment rights." Pet. App. 126a. The court misread this Court's Reconstruction-era decisions, which do not bar Congress from reaching the conduct of private persons, when Congress does so in order to remedy discrimination by a State or its agents.

In *Harris*, the Court struck down a statute that was premised on the assumption that purely private conduct could violate the Fourteenth Amendment. The statute at issue, Section 2 of the Civil Rights Act of 1871, ch. 22, 17 Stat. 13, outlawed conspiracies among private persons to deprive any person of the equal protection of the law. The explicit predicate for the application of the statute was a finding that private persons had committed an equal protection violation.[26]

The statute at issue in the *Civil Rights Cases* similarly purported to extend the affirmative requirements of the Fourteenth Amendment directly to private persons. The Civil Rights Act of 1875, ch. 114, 118 Stat. 335, established a right to be free of private discrimination in public accommodations. See 109 U.S. at 9.[27] The Court explained that the

[26] See 17 Stat. 13 (making it a crime for two or more persons, "either directly or indirectly," to "depriv[e] any person or any class of persons of the equal protection of the laws").

[27] See 18 Stat. 336 (establishing a right in all persons to "the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement," and making it a crime to violate that right).

critical flaw in the statute was that it did "not profess to be corrective of any constitutional wrong committed by the States"; instead, the statute "step[ped] into the domain of local jurisprudence, and [laid] down rules for the conduct of individuals in society towards each other, and impose[d] sanctions for the enforcement of those rules, without referring in any manner to any supposed action of the State or its authorities." *Id.* at 14.

Unlike the statutes invalidated by the Reconstruction-era Court, Section 13981 is not premised on the assumption that private conduct can violate the Fourteenth Amendment. Instead, Section 13981 remedies and prevents discrimination by the States themselves. Nothing in this Court's precedents bars Congress from regulating private conduct in order to provide a remedy for unconstitutional state action.[28] To the contrary, as Congress declared in enacting the Violence Against Women Act: "While the 14th amendment itself only covers actions by the States, Congress's power to enforce the amendment includes the power to create a private remedy as the most effective means to fight public discrimination." 1993 S. Rep. 55 n.72 (citing *Morgan*, *supra*; *District of Columbia* v. *Carter*, 409 U.S. 418, 423, 424 n.8

[28] This case therefore does not present the question framed by the court below (see, *e.g.*, Pet. App. 97a), namely, when, if ever, Section 5 legislation may address private conduct in the absence of a congressional finding of unconstitutional state action. Compare *United States* v. *Guest*, 383 U.S. 745, 755 (1966) ("rights under the Equal Protection Clause itself arise only where there has been involvement of the State or one acting under the color of its authority," which "is not to say, however, that the involvement of the State need be either exclusive or direct"), with *id.* at 762 (Clark, J, concurring) ("§ 5 empowers the Congress to enact laws punishing all conspiracies—with or without state action—that interfere with Fourteenth Amendment rights"), and *id.* at 782 (Brennan, J., dissenting) (same).

(1973) (that "[t]he Fourteenth Amendment itself 'erects no shield against merely private conduct' * * * is not to say * * * that Congress may not proscribe purely private conduct under § 5 of the Fourteenth Amendment")). Accordingly, Section 13981 is properly viewed as "corrective legislation, that is, such as may be necessary and proper for counteracting * * * such acts and proceedings as the States may commit or take, and which by the [Fourteenth] amendment they are prohibited from committing or taking." *The Civil Rights Cases*, 109 U.S. at 13-14.

2. Nor does this Court's decision in *Flores* call into question the validity of Section 13981 as legislation to remedy and deter violations of constitutional rights.

In *Flores*, the Court held that Congress exceeded its authority under Section 5 of the Fourteenth Amendment in applying the Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488, to the States, because RFRA appeared to redefine the substantive scope of a constitutional right, rather than simply to enforce a constitutional right as defined under existing law. RFRA was adopted in direct response to this Court's decision in *Employment Division* v. *Smith*, 494 U.S. 872 (1990), which held that the States do not need a compelling justification to enforce neutral, generally applicable laws that burden religious practices. The express purpose of RFRA was to reimpose the earlier compelling interest test. *Flores*, 521 U.S. at 515-516. The Court concluded that the remedy provided by RFRA was wholly disproportionate to any violations of a recognized constitutional right. The Court found that the legislative record lacked evidence of any such constitutional violations, *i.e.*, any generally applicable law that had been enacted in modern times out of religious bigotry. *Id.* at 530. And, even if some small number of such constitutional violations existed, RFRA was too "[s]weeping" in its coverage to "be understood as responsive to, or designed to prevent," them. *Id.* at 532; see *ibid.* (observing that RFRA "intrud[ed] at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter"). The Court therefore concluded that RFRA could not properly be viewed as legislation to "enforce" any recognized constitutional right. Because Section 5 gives Congress the power only to "enforce," not to define, constitutional rights, the Court held that RFRA was not a permissible exercise of the Section 5 power. See *id.* at 519 ("Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause.").

Section 13981 does not redefine the substantive prohibitions of the Fourteenth Amendment. To the contrary, Section 13981 provides an additional remedy for constitutional violations under existing law, *i.e.*, the States' denial of the equal protection of the laws to victims of gender-motivated violence due to "bias and discrimination in the [state] criminal justice system." Conf. Rep. 385. That remedy, moreover, is proportional to the constitutional violations that Congress identified. In contrast to the situation in *Flores*, Congress compiled an extensive record of equal protection violations, which Congress found were frequent, ongoing, and pervasive. See, *e.g.*, 1993 S. Rep. 49 (noting the "overwhelming evidence" contained in "[s]tudy after study" that "gender bias permeates the court system and that women are most often its victims"). And, in contrast to the situation in *Flores*, Congress fashioned an appropriately limited remedy in Section 13981 that in no way intrudes into the operations of state government.[29]

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[29] For similar reasons, Section 13981 does not suffer from the defects that the Court perceived in the Patent Remedy Act, which was held in *Florida Prepaid Postsecondary Education Expense Board* v. *College Savings Bank*, 119 S. Ct. 2199 (1999), not to be permissible Section 5 legislation. In *Florida Prepaid*, the Court emphasized that "Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations." *Id.* at 2207. Congress did identify a pattern of constitutional violations in enacting Section 13981. Moreover, in *Florida*

CONCLUSION

The judgment of the court of appeals should be reversed.
Respectfully submitted.

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Prepaid, the Court noted the Patent Remedy Act's "indiscriminate scope," which would expose a State to liability for "[a]n unlimited range of state conduct." *Id.* at 2210. Section 13981 does not operate against the States at all. And Section 13981 narrowly defines the private conduct that may give rise to liability. See 42 U.S.C. 13981(d) and (e).

APPENDIX

STATUTORY PROVISIONS

42 U.S.C. 13981 provides:

Civil rights

(a) Purpose

Pursuant to the affirmative power of Congress to enact this part under section 5 of the Fourteenth Amendment to the Constitution, as well as under section 8 of Article I of the Constitution, it is the purpose of this part to protect the civil rights of victims of gender motivated violence and to promote public safety, health, and activities affecting interstate commerce by establishing a Federal civil rights cause of action for victims of crimes of violence motivated by gender.

(b) Right to be free from crimes of violence

All persons within the United States shall have the right to be free from crimes of violence motivated by gender (as defined in subsection (d) of this section).

(c) Cause of action

A person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) of this section shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.

(d) Definitions

For purposes of this section—[1]

(1) the term "crime of violence motivated by gender" means a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender; and

(2) the term "crime of violence" means—

(A) an act or series of acts that would constitute a felony against the person or that would constitute a felony against property if the conduct presents a serious risk of physical injury to another, and that would come within the meaning of State or Federal offenses described in section 16 of title 18, whether or not those acts have actually resulted in criminal charges, prosecution, or conviction and whether or not those acts were committed in the special maritime, territorial, or prison jurisdiction of the United States; and

(B) includes an act or series of acts that would constitute a felony described in subparagraph (A) but for the relationship between the person who takes such action and the individual against whom such action is taken.

---

[1] So in original. The word "means" probably should appear after "(A)" below.

(e) Limitation and procedures

(1) Limitation

Nothing in this section entitles a person to a cause of action under subsection (c) of this section for random acts of violence unrelated to gender or for acts that cannot be demonstrated, by a preponderance of the evidence, to be motivated by gender (within the meaning of subsection (d) of this section).

(2) No prior criminal action

Nothing in this section requires a prior criminal complaint, prosecution, or conviction to establish the elements of a cause of action under subsection (c) of this section.

(3) Concurrent jurisdiction

The Federal and State courts shall have concurrent jurisdiction over actions brought pursuant to this part.

(4) Supplemental jurisdiction

Neither section 1367 of Title 28 nor subsection (c) of this section shall be construed, by reason of a claim arising under such subsection, to confer on the courts of the United States jurisdiction over any State law claim seeking the establishment of a divorce, alimony, equitable distribution of marital property, or child custody decree.

DEC 13 1999

Nos. 99-5, 99-29

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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES,

Petitioner,

v.

ANTONIO J. MORRISON AND JAMES LANDALE [sic] CRAWFORD,

Respondents.

CHRISTY BRZONKALA,

Petitioner,

v.

ANTONIO J. MORRISON AND JAMES LANDALE [sic] CRAWFORD,

Respondents.

On Writ Of Certiorari To United States Court Of Appeals For The Fourth Circuit

BRIEF OF RESPONDENT JAMES LaDALE CRAWFORD

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QUESTIONS PRESENTED

1. To the extent it provides for a lawsuit between private individuals, is 42 U.S.C. § 13981 within Congress's power to regulate "commerce . . . among the states" or to enforce the prohibition against states "deny[ing] to any person within its jurisdiction the equal protection of the laws"?

2. Did the amended complaint in this action state a claim pursuant to 42 U.S.C. § 13981?

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STATEMENT OF THE CASE

A. Allegations Of The Complaint

The order of the court below affirmed a judgment of the District Court dismissing the action upon a Rule 12(b)(6) motion for failure to state a claim. Accordingly, for purposes of this brief, Crawford must assume the truth of the allegations set forth in the amended complaint in this action.

Brzonkala is a resident of Fairfax, Virginia. J.A. 14 (Amended Complaint ("Am. Com.") ¶ 7). She alleges that Morrison and Crawford engaged in a sexual assault on her "[o]n the night of September 21-22, 1994" in "a student room on the third floor" of Brzonkala's dormitory at Virginia Polytechnic Institute and State University ("Virginia Tech"). J.A. 15 (Am. Com. ¶ 13). She further alleges that, after the assault, Morrison then told her that she "better not have any f***g diseases" and "clad only in his underwear followed wordlessly behind [her]" through the dorm building, from the third floor to Brzonkala's suite on the second floor. J.A. 17 (Am. Com. ¶¶ 22-23). Sometime within the next five months, Morrison reportedly was overheard in the dining hall to say "I like to get girls drunk and f**k the s**t out of them." J.A. 18 (Am. Com. ¶ 31). But Brzonkala asserts that "she was not inebriated at the time of the assaults." J.A. 16 (Am. Com. ¶ 14).

Brzonkala knew the given names of her purported assailants and knew that they were members of Virginia Tech's football team. J.A. 16 (Am. Com. ¶ 13). Despite this, and although the alleged attack took place in her own dormitory one floor above her own room, she apparently made no effort to ascertain their identity after the alleged attack. Id.

Brzonkala did not preserve any physical evidence from the alleged rapes and "did not bring criminal charges against Morrison or Crawford." J.A. 18 (Am. Com. ¶ 33). Nonetheless, Brzonkala "approved and . . . participat[ed] in a [subsequent] criminal investigation about events which occurred on September 21-22, 1994 by the Virginia State Police," J.A. 14 (Am. Com. ¶ 4). The record does not disclose the outcome of that investigation.[1]

The amended complaint in this action sought a remedy pursuant to 42 U.S.C. § 13981 ("Section 13981"), which is the main part of Subtitle C of Title IV of Public Law 103-322, referred to as the Violence Against Women Act ("VAWA").

B. Statutory Background

As petitioners stress, Congress is not obligated to follow any particular procedures or evidentiary rules in holding hearings. Brief of the United States ("U.S. Br.") 38; Brief of Christy Brzonkala ("Brzonk. Br.") 45. In practice, this means that Congress can "find" virtually anything that it is determined to find by stacking the evidentiary deck. VAWA provides an object lesson in this process. Three different Congresses (the 101st, 102nd and

[1] In fact, in 1996, the Grand Jury of the Circuit Court of Montgomery County, Virginia returned "not a true bill" with respect to the Brzonkala allegations against Morrison and Crawford. (That is, the grand jury refused to indict.) The matter was presented to the Grand Jury by Virginia State Police investigators who had conducted probably the most extensive investigation in the history of the Commonwealth of Virginia in a rape investigation. Ms. Brzonkala was invited to appear before the Grand Jury and give testimony, but chose not to appear. Although not in the record, the grand jury's decision is a matter of public record of which this Court may take judicial notice.

103rd) held hearings related to VAWA over four years. Petitioners and their amici cite many anecdotes from the legislative history, from testimony of victims of violence who claimed that state police officers, prosecutors, or magistrates were insensitive or neglectful in the handling of their cases (e.g., U.S. Br. 9-10). Congress invited no state officials accused of bias or neglect to respond. Petitioners cite many statistics demonstrating the disparate impact certain kinds of violence has upon women. These statistics are far from undisputed, and many researchers have concluded that domestic violence affects men as well as women, and that the justice system treats women favorably. (This research is cited in the briefs of some of respondents' amici.) Not once was any researcher with a different perspective asked to testify before Congress.[2] Given this, it is hardly surprising that Congress concluded that it had the constitutional power to pass Section 13981. What is surprising is the weakness of the evidence supporting its conclusions.

A VAWA-like proposal was first submitted in 1990 in S. 2754. From the outset, even the proposal's sponsors admitted that it would do little to reduce violent crime against women. E.g., Women And Violence: Hearing Before The Senate Judiciary Committee, 101st Cong., Part 1, 2 (1990) ("1990 Hearings") (opening Statement of Chairman Biden) ("I don't expect that making this a civil rights violation will solve this problem. People will not

[2] Indeed, even the Department of Justice's own statistics rarely saw the light of day. Bureau of Justice Statistics, Violence Between Intimates 4-5 (Nov. 1994, NCJ 149259) (also available at http://blackstone.ojp.usdoj.gov/bjs/pub/pdf/vbi.pdf) (women are more likely to report violent crimes than men; police respond, take police reports, and question witnesses in cases of attacks on women largely without regard to whether the woman's attacker is an intimate or not).

say, 'I was thinking of committing a crime of violence and raping that woman, but now that it is a civil rights violation, I won't do it because I may be sued in Federal court.' But it does say . . . there is a need for the national psyche to acknowledge that there is something horribly wrong. The law should reflect that attitude").

The 1990 proposal was not based on bias in state civil justice systems. Indeed, while referring to the statistic petitioners now cite concerning the low percentage of civil jury trials for rape victims (e.g., U.S. Br. 10) -- a not altogether surprising statistic since the numerator is the number of civil jury trials alleging rape and the denominator includes those plus all bench trials, settlements, and cases never filed or dropped in which rape could have been alleged (S. Rep. 101-545 at 42 & n.86 (1990)) -- the Senate Report explicitly stated that the statistic was "not intended to suggest intentional failures by states to enforce or pass civil laws to protect victims" (id. at 42). Indeed, the hearings underscored that obtaining a civil recovery was difficult because most defendants were judgment-proof. 1990 Hearings, 39 (testimony of Marla Hanson) ($78 million judgment could not be collected); id. at 44 (testimony of William Olson) (most perpetrators are near judgment-proof). Pet. App. 154a.

The proposal introduced in 1991 (S. 15, 102nd Cong. (1991)) also did not rely upon state failure to enforce state laws. To the contrary, the civil remedy

> does not permit a claim because a municipality, State or the Federal Government has "failed to protect" a citizen. Current law announced by the Supreme Court bars such claims and there is nothing in [the civil remedy proposal] that would

> overrule the Court's due process analysis. See DeShaney v. Winnebago, 489 U.S. 189 (1989).

S. Rep. 102-197 at 69 (1991) (emphasis added).

In the early hearings, prosecutors testified that many cases of sexual violence had been difficult to bring to trial because many female victims preferred plea bargains to a day in court where they would have to relive the crime. Id. at 47, 102 (testimony of Linda Fairstein).

Despite subsequent efforts to fit the statute within Congress's power to enforce the Equal Protection Clause -- by "finding" state bias permeated the justice system -- throughout the course of the hearings, Congress heard significant testimony from many sources describing the extensive efforts by states to fight domestic violence, sexual assault, rape, and other crimes in which women are significantly affected. See Pet. App. 154a-56a (citing testimony and hearings). See also Hearings On Domestic Violence: Hearing Before The Senate Judiciary Committee, 103rd Cong. 33 (1993) (noting recently passed legislation in Massachusetts); Violence Against Women: Fighting The Fear -- Hearings Before The Senate Judiciary Committee , 103rd Cong. 11-12 (1993) (describing development by police in Maine of a scale to assess domestic violence situations, and Maine Legislature's permitting warrantless arrests in domestic violence cases); id. at 43 (Statement of John Atwood) (describing "spirit of commitment" in Maine); Violent Crimes Against Women: Hearings Before the Senate Judiciary Committee, 103rd Cong. 37 (1993) (domestic violence identified as a priority in Utah prosecutor's office); Violence Against Women: Hearing Before Subcommittee On Crime And Criminal Justice Of The House Judiciary Committee, 102nd Cong. 60 (1992)

(Ohio legislation noted); Violence Against Women: Victims of the System: Hearing Before the Senate Judiciary Committee, 102nd Cong. 25 (1991) (Statement of Bonnie Campbell) (Iowa is "more mobilized than ever to stop this scourge [of domestic violence]"); 1990 Hearings, 47, 52 (1990) (Statement of Linda Fairstein) (NY County District Attorney's office has devoted "extraordinary resources" to Sex Crimes Prosecution Unit); S. Rep. 101-545 at 38 (noting the wide availability of protective orders).

Finally, there was little evidence presented that the various aspects of state procedure about which Congress or witnesses had concerns -- the absence of protective evidentiary rules in civil cases, short statutes of limitations, and virtually extinct tort immunities -- were maintained by the States because of intentional sex discrimination against women. Pet 154a. Cf. S. Rep. 102-197 at 47 (1991) (beyond a reasonable doubt standard made conviction on "acquaintance rape" charges difficult).

Indeed, the primary purpose of Section 13981 appears to have been to "send a signal" that violence against women should not be tolerated. S. Rep. 103-138 at 50 (1993) (send a "special societal judgment"); Pet. App. 160a. No doubt such signal-sending is politically popular. Or, as the author of VAWA put it when discussing the chances for additional amendments to VAWA, "everybody's afraid to say no." Speech Of Senator Joseph Biden Before The National Association Of Attorney Generals (March 13, 1998) (C-SPAN television broadcast).

Because of concerns that the early proposals would allow claims that would inundate the federal courts, the sponsors of VAWA narrowed Section 13981 in 1993 so that it would apply only to gender-based and animus-

motivated felonies. Amicus Brief of Sen. Biden ("Biden Amicus Br.") 16-17. At that time, Congress made clear that Section 13981 did not cover all rapes or violent attacks against women. See S. Rep. 103-138 at 51 (1993) (the civil remedy "does not create a general Federal law for all assaults or rapes against women"). Even before that statutory narrowing, the self-proclaimed "author of VAWA" (Biden Amicus Br. 1) made it clear that Section 13981, did not cover most cases of domestic violence. S. Rep. 102-197, at 69 (1991) (the civil remedy "does not cover everyday domestic violence cases . . . This is stated clearly in the committee report and it is the only fair reading of the statutory language") (Statement by Sen. Biden).

VAWA eventually passed both houses of Congress, and was signed by the President in September 1994. As passed, Section 13981 creates a new tort claim against the perpetrators of "crimes of violence motivated by gender." 42 U.S.C. § 13981(c). Subsection (d) provides that gender-motivated violence is "a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender." 42 U.S.C. § 13981(d)(1). A "crime of violence" is, in turn, defined as an act or series of acts that (1) "would constitute" either (a) a felony against the person or (b) a felony against property that presents "a serious risk of physical injury to another" and (2) that constitutes an act of violence pursuant to 18 U.S.C. § 16. 42 U.S.C. § 13981(d)(2)(A).

Perhaps somewhat redundantly, an "act of violence" is defined in 18 U.S.C. § 16 as (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its

nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. It is difficult to envision a felony that would meet the first part of the definition of "crime of violence" and not also be an "act of violence" under 18 U.S.C. § 16.

Section 13981 gives state courts concurrent jurisdiction. 42 U.S.C. § 13981(e)(3). Prevailing plaintiffs in claims brought under Section 13981 are entitled to recover their reasonable attorneys' fees. See 42 U.S.C. § 1988(b); Pub. L. 103-322, § 40303.

Because Section 13981 became law in 1994, the four-year statute of limitations set forth in 28 U.S.C. § 1658 applies to any claim under Section 13981, longer than the limitations periods for intentional torts in most states.

C. Proceedings In The Courts Below

Brzonkala filed the original complaint on or about December 27, 1995, and filed the amended complaint shortly thereafter. The amended complaint added two new parties, Cornell Brown and William Landsidle and a variety of new claims. (Claims against both of these parties were eventually dismissed; the claims against Brown were dismissed in part on plaintiff's own motion for voluntary dismissal. J.A. 9-10.) The amended complaint asserted claims under Section 13981 and state tort law against Morrison and Crawford, and a Title IX claim against Virginia Tech. Shortly thereafter, defendants Morrison and Crawford moved to dismiss the amended complaint on the grounds that the amended complaint failed to state a claim under Section 13981, that Section

13981 could not be constitutionally applied to them, and that the court had no jurisdiction over the state tort claims. The United States intervened to defend the constitutionality of Section 13981.

1. The District Court's Decision

The District Court dismissed plaintiff's claims under Section 13981 in an order and judgment dated July 26, 1996. The pendent state claims were dismissed without prejudice. Pet. App. 402a-03a.[3]

The District Court first addressed respondents' contention that the amended complaint did not adequately allege "gender animus." The court rejected that argument, citing the allegations in the amended complaint that (1) Morrison and Crawford allegedly engaged in "gang rape"; (2) the alleged rapes were closer to "stranger rape" than "date rape" which made them less likely, according to the Court, to involve a misunderstanding, personal animus, or overheated sexual passion; and (3) some months after the alleged incident, Morrison was allegedly overheard saying that he liked to "get girls drunk and f**k the s**t out of them." Pet. App. 359a-60a. The court concluded that these allegations stated a claim against Morrison. It did not decide whether a claim had been alleged against

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[3] The Title IX claims against Virginia Tech had been dismissed by an earlier order. See J.A. 9 (Docket Entries 46-47). On appeal the en banc Fourth Circuit unanimously upheld the dismissal of Brzonkala's Title IX "disparate treatment" claim against Virginia Tech. Pet. App. 8a-9a n.2; Pet. App. 218a (Motz, J. dissenting). The full court remanded Brzonkala's Title IX "hostile environment" claim to the District Court to await this Court's decision in Davis v. Monroe County Bd. Of Educ., 526 U.S. 629 (1999). Pet. App. 8a-9a n.2. It currently remains before the District Court.

Crawford. Pet. App. 361a-62a.

The District Court then analyzed the constitutionality of Section 13981, considering first whether Section 13981 could be justified as legislation designed to "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const., art. I, § 8, cl. 3. The court applied this Court's reasoning in United States v. Lopez, 514 U.S. 549 (1995), holding that Congress exceeded its authority under the Commerce Clause in passing 18 U.S.C. § 922(q), the Gun-Free School Zones Act ("GFSZA"). Considering the three permissible categories of regulation this Court had identified in Lopez (viz., regulating the channels of interstate commerce, regulating the instrumentalities of interstate commerce, and regulating activity that substantially affects interstate commerce), the District Court concluded, just as in Lopez, that the first two categories were inapplicable. Pet. App. 363a-64a.

The District Court then considered four factors from Lopez to determine whether Section 13981 was a proper exercise of Congress's authority under the third category: (1) whether the regulated activity is economic in nature, (2) the presence of a jurisdictional requirement in the law itself, (3) the importance of legislative history, and (4) the practical implications of accepting an argument that the regulated activity "substantially affects" interstate commerce. Pet. App. 365a-69a.

The District Court compared the similarities and differences between Section 13981 and the GFSZA and concluded that the similarities (the non-economic nature of the activity being regulated, the absence of any jurisdictional requirement, and the practical implications of recog-

nizing the effects on commerce of the regulated activity as "substantial") outweighed the differences. It considered three possible differences: (1) Congress made more extensive findings with respect to Section 13981 than it had with the GFSZA; (2) Section 13981 provides for civil liability rather than criminal; and (3) "fewer steps of causation" are involved in going from the regulated activity to an effect on interstate commerce. Pet. App. 371a-76a.

With respect to congressional findings underlying Section 13981, the District Court found that this Court specifically had denied any necessity for Congress to make findings. In addition, it recognized that Congress had amended the GFSZA to add such findings (and that such findings were before this Court when Lopez was argued and decided),[4] and that this Court specifically considered the effects on interstate commerce proffered by the Solicitor General. Accordingly, the District Court concluded that the existence of legislative findings for Section 13981 did not distinguish Lopez. Pet. App. 371a-73a.

With respect to the civil nature of Section 13981, the District Court noted that the Act defines the conduct that it regulates in terms of criminal law (see 42 U.S.C.

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[4] In Section 320904 of Public Law 103-322, Congress amended the GFSZA to set forth findings that crime is a nationwide problem which is exacerbated by the interstate movement of drugs, guns, and criminal gangs; firearms and their component parts move easily in interstate commerce and guns have been found in increasing numbers around schools; citizens fear to travel through certain parts of the country due to concern about violent crime and gun violence; the occurrence of violent crime in school zones has resulted in a decline in the quality of education, which in turn has had an adverse impact on interstate commerce; and States are unable to handle gun-related crime on their own. 18 U.S.C.A. § 922(q)(1).

§ 13981(d)(2)(A)) and that, in any event, this Court has never analyzed criminal and civil laws passed pursuant to Congress's Commerce Clause authority any differently. Pet. App. 373a-74a.

With respect to the steps of causation, the District Court found any difference unimportant because gun-ownership is sufficiently close to acts of violence -- indeed, the entire body of federal gun control law is based on the assumption that one leads to the other -- and because the alleged effects touted by the government for both laws, such as the unwillingness of people to travel, did not require actual violence, but only the threat of violence. Pet. App. 374a-76a. The District Court specifically addressed Brzonkala's argument that violence precluded women from full participation in the economy. It concluded that it was similar to the argument, rejected in Lopez, that violence around schools precluded schoolchildren from full participation in the economy. Pet. App. 375a.

Because any differences between the two statutes were outweighed by the similarities, the District Court concluded that Congress had no authority to pass Section 13981 as a regulation of interstate commerce. Pet. App. 376a-82a.

In analyzing whether Congress had the authority under Section 5 of the Fourteenth Amendment to reach the private conduct regulated by Section 13981, the District Court began by noting that the Civil Rights Cases, 109 U.S. 3 (1883) precluded any finding that Congress had such authority. Pet. App. 385a. Nonetheless, the District Court engaged in an extensive analysis to determine whether Section 13981 could survive a means/ends test, presaging this Court's subsequent decision in City of Boerne v.

Flores, 521 U.S. 507 (1997). It concluded that remedying private discriminatory acts unrelated in the specific instance to any state rule of conduct or otherwise chargeable to the state was not a legitimate end under the Fourteenth Amendment. Pet. App. 391a-98a. The court then concluded that remedying state bias against women was a legitimate end under the Fourteenth Amendment, but that Section 13981 was not "plainly adapted" to that end. Pet. App. 399a-401a.

Concluding that neither the Commerce Clause nor Section 5 of the Fourteenth Amendment of the United States Constitution granted Congress authority to reach the non-economic, private conduct covered by Section 13981, the court granted the Rule 12(b)(6) motion of Morrison and Crawford. The court declined to exercise supplemental jurisdiction over Brzonkala's state law claims.

2. Proceedings In The Fourth Circuit

On December 23, 1997, a divided panel of the Fourth Circuit reversed the decision of the District Court. It held that Section 13981 was a legitimate exercise of Congress's Commerce Clause power, but did not determine whether Section 5 of the Fourteenth Amendment could sustain Section 13981. Pet. App. 282a. On February 2, 1998, the full court vacated the opinion of that panel and ordered the case reheard en banc in March 1998. Pet. App. 13a. One year later, the full court affirmed the judgment of the District Court.

The en banc court first concluded that the allegations of the amended complaint did state a claim against Morrison, relying on an offensive statement he allegedly made (at some undefined time during the five months

following the alleged sexual assault). Pet. App. 14a. The Fourth Circuit noted that the allegations did not "necessarily compel the conclusion that Morrison acted from animus toward women as a class" and "might not even be sufficient, without more, to defeat a motion either for summary judgment or for a directed verdict." Id. The court also did not reach the question of whether the amended complaint stated a claim against Crawford. Id. n.3.

Reaching the constitutional issue, the court first concluded that Section 13981 could not be sustained as an exercise of Congress's Commerce Clause authority. It noted that the phrase "substantially affects interstate commerce" was a term of "legal art" (Pet. App. 17a) that required an examination of the factors considered important in Lopez. It cited numerous passages from Lopez all supporting the proposition that this Court, in concluding that Congress exceeded its powers, placed great emphasis on the non-economic nature of the activity being regulated by the GFSZA. The Fourth Circuit concluded that the non-economic nature of the activity being regulated was an important, if not dispositive, factor in defining the outer limits of the phrase "substantially affects interstate commerce." Pet. App. 18a-20a & 20a-22a n.5 (numerous different cites from Lopez majority opinion, concurrences, and dissents).

The court concluded that Section 13981 regulated, and was intended to regulate, non-economic activity, and was not part of a larger scheme regulating economic activity. Pet. App. 24a-27a. Since, in addition, Section 13981 had no jurisdictional element, the court concluded that it did not "substantially affect" interstate commerce, and thus could not be sustained under Congress's authority to regu-

late "commerce among the several states." Pet. App. 31a.

Nonetheless, the en banc court went on to assess Section 13981 under the assumption that the regulation of non-economic activity rendered the statute only presumptively unconstitutional. Pet. App. 31a-32a. It noted the arguments identifying the effects gender-based, animus-motivated violence have on interstate commerce "closely resemble, and are functionally equivalent to, the arguments advanced by the government in Lopez" (Pet. App. 35a). Accepting these arguments would "effectively . . . remove all limits on federal authority, and . . . render unto Congress a police power impermissible under our Constitution" (Pet. App. 40a). See also Pet. App. 90a-91a & 91a-92a n.23 (taking quote from dissent and showing that, by removing the words "gender-based," it equally supports the regulation of all violent crime). Thus, the court concluded that the other factors identified in Lopez also militated in favor of its conclusions.

The Court of Appeals then proceeded to consider each argument that petitioners offered to distinguish Lopez. It first rejected petitioners' argument that this Court relied heavily on the absence of Congressional findings in Lopez and/or that this Court concluded that it would have to "pile inference upon inference" (Lopez, 514 U.S. at 567) to conclude that possession of guns substantially affected interstate commerce solely because of an absence of Congressional findings. Pet. App. 52a-64a. The Fourth Circuit concluded that the argument more nearly described the decision of the Fifth Circuit in Lopez, which had relied entirely on the absence of findings, rather than the opinion of this Court. Pet. App. 60a-61a. It recognized that this Court specifically had held that legislative findings were not necessary and opined that "one would have to ignore

everything the [Supreme] Court said in [Lopez], other than its single, passing allusion to the statute's lack of findings" to conclude that the constitutional flaw in the GFSZA could be remedied by such findings. Pet. App. 62a.

Like the District Court, the Fourth Circuit also noted that this Court had findings before it, and that Lopez thus would have been an "unusual case" to announce a rule that Congress must engage in procedural formalities similar to the rules imposed upon administrative agencies. Pet. App. 63a. See also id. (under government's view, Lopez "would have constituted little more than historical irrelevancy"). Finally, the Court noted that the government's own position subsequent to Lopez demonstrated that "findings" were insufficient. Pet. App. 64a.

In addressing petitioners' remaining arguments, the en banc Court of Appeals concluded that (1) there was no special consideration in the Constitution for laws labelled "civil rights" laws, that rubric being undefined in or outside of the Constitution, and that any such law must be passed pursuant to a specific enumerated power (Pet. App. 70a-76a), (2) pre-Lopez cases did not require it to uphold Section 13981 for the same reasons they did not require this Court to sustain the GFSZA, i.e., because the earlier decisions involved statutes which regulated "economic activity" in a way that the possession of guns around schools or violent gender-based animus-motivated felonies did not (Pet. App. 80a-83a), and (3) petitioners' arguments that Section 13981 did not offend principles of federalism misunderstood the principle of federalism that motivated this Court in Lopez, viz., the logical consequences of the arguments proffered to uphold the GFSZA as opposed to the particular intrusiveness of any specific law (Pet. App. 88a). (On this last point, the Fourth Circuit noted that the

GFSZA was careful to leave intact state definitions, and did not preempt state law -- indeed, it concluded that the GFSZA was more respectful of state law than Section 13981. Compare Pet. App. 42a n.10 with Pet. App. 44a.)

The Fourth Circuit then turned to Section 5 of the Fourteenth Amendment, the other proposed basis for constitutional power to pass Section 13981. After noting the history of the Amendment -- and specifically, the failed Bingham Amendment which would have given Congress a general power to legislate with respect to private conduct traditionally regulated by the states -- the court concluded that Section 5 only permitted Congress to legislate directly against state action. The Fourth Circuit found support for that conclusion in two decisions of this Court: United States v. Harris, 106 U.S. 629 (1883) and the Civil Rights Cases, 109 U.S. 3 (1883), which the Fourth Circuit analyzed in great detail. Pet. App. 104a-111a. It noted that each case involved a civil rights statute that had been passed only after extensive evidence had been presented demonstrating that the States had failed to protect African Americans (like respondents) against private harms violative of state law. Pet. App. 119a-21a, 124a-25a.

The Fourth Circuit then considered their efforts to distinguish the Civil Rights Cases and United States v. Harris, and rebutted them. Pet. App. 119a-25a. The Court of Appeals rejected the petitioners' argument that Harris and the Civil Rights Cases had been "tacitly" overruled by later cases. Pet. App. 126a-44a. The Fourth Circuit noted that this Court had just reaffirmed the Section 5 analysis of those cases in City of Boerne v. Flores, 521 U.S. 507, 524-25 (1997). Pet. App. 104a, 141a-42a.

Although it deemed the matter controlled by

binding precedent, the Fourth Circuit also applied City of Boerne and engaged in a "means/ends" analysis to determine if Section 13981 was appropriate prophylactic legislation for preventing likely Section 1 violations. It concluded that much of the legislative history did not demonstrate the kind of purposeful discrimination by state actors required by the Equal Protection Clause. Pet. App. 151a-60a. Rather, its review of VAWA, and its overall structure and legislative history, demonstrated that Section 13981 was designed to send a "signal" that might overcome subtle societal prejudices. Pet. App. 160a.

The Fourth Circuit also concluded that there was no "congruence and proportionality" between Section 13981 and any violation of the Equal Protection Clause. It found that the statute does nothing to remedy or correct discriminatory enforcement of laws by the States and that the existence or non-existence of a cause of action under Section 13981 in any specific case has nothing to do with any finding of an Equal Protection violation. Pet. App. 160a-63a.

Finally, the Fourth Circuit concluded that petitioners' bold theory of Section 5 would allow Congress to regulate directly in any area (like criminal law and domestic relations) in which there is any evidence of gender or racial bias in state procedures or institutions. It noted that the same studies relied upon in passing Section 13981 also found bias in many other areas of law, and would (under petitioners' theory) permit Congressional takeover of such areas. Pet. App. 164a-66a. See also Pet. App. 74a-76a, 89a. So, too, a finding of State "failure" to enforce robbery or burglary laws protecting property rights against private invasion would permit Congress to regulate those areas as well, as a means of enforcing the Section 1

provision precluding State deprivations of property without due process. Pet. App. 165a. The Fourth Circuit concluded that it could not give its imprimatur to such expansive theories of Congressional authority under Section 5. Pet. App. 166a.

Chief Judge Wilkinson and Judge Niemeyer joined the majority opinion, but each also wrote separate concurrences. Pet. App. 169a-209a. Four judges dissented. The dissenters agreed with the majority that the amended complaint stated a claim against Morrison, but also asserted that it stated a claim against Crawford because Morrison's purported statement months after the alleged rape were "in furtherance of a conspiracy." Pet. App. 223a. The dissent did not explain how the "conspiracy" was furthered by the statement.

The dissent also concluded that Section 13981 was a proper exercise of Congress's authority under the Commerce Clause. In the dissent's view, "[t]he Lopez Court never held that the challenged statute exceeded Congress's authority because it did not [regulate a commercial activity or have an interstate commerce requirement]." Pet. App. 241a (emphasis in original). Rather, Lopez held only that the regulation of "non-economic" activity would trigger a second level review to determine "the possible representative superiority of the states." Pet. App. 264 n.11. (The dissent did not explain how to assess "representative superiority" except to say that history might be a guide, but it could not be dispositive. Pet. App. 267a n.12.) The dissent also viewed the characterization of gender-based, animus-motivated violence as non-economic as an "unfounded categorical assertion[]." Pet. App. 248a n.7.

Responding to the majority's concern that the peti-

tioners' theories would give Congress a general police power, the dissent concluded that the absence of any practical limitation on a Commerce Clause theory was not a dispositive factor. Pet. App. 268a.

SUMMARY OF ARGUMENT

The constitutional analysis of both courts below was fair, thorough, and correct. Crawford joins in the arguments set forth in the brief of respondent Morrison that so demonstrate.

Petitioners try to evade the holding of Lopez through various non-existent or unimportant factual differences. Examining those so-called "distinctions" leads to the conclusion that petitioners do not seek to distinguish Lopez so much as have this Court essentially overrule it. But they do not ask this Court to do so, perhaps realizing that they lack the "special justification" required to overturn a significant precedent of such recent vintage. Arizona v. Rumsey, 467 U.S. 203, 212 (1984).

Similarly, petitioners' argument pursuant to Section 5 of the Fourteenth Amendment is a creative reinterpretation of American history and this Court's decisions in United States v. Harris, 106 U.S. 629 (1883) and the Civil Rights Cases, 109 U.S. 3 (1883). They simply ignore the history that the Fourth Circuit set forth in such detail.

The courts below did not reach the question of whether the amended complaint stated a claim against Crawford. It did not. Although the exact definition of "animus" is, to be sure, somewhat mysterious, it should be interpreted narrowly so as to interfere with the minimum

amount of traditional state authority.

Even with a narrow definition of "animus," though, Section 13981 displaces state prerogative in areas of traditional state authority, viz., torts and intrafamilial relations. Although intrusion into areas where states have traditionally regulated is not, of itself, a reason to declare Section 13981 unconstitutional, such encroachment further supports the conclusion of the courts below that Section 13981 lies outside Congress's enumerated powers.

ARGUMENT

I. THE COMMERCE CLAUSE ANALYSIS IS GOVERNED BY *LOPEZ*, WHICH UPHOLDS THE DOCTRINE OF ENUMERATED POWERS

As the courts below held, the Commerce Clause analysis in this case is governed by this Court's decision in United States v. Lopez, which held that Congress cannot regulate conduct wholly non-economic in nature because recognition of such a power would authorize Congress to regulate virtually anything.[5] This Court held that the

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[5] The government defends Section 13981 with the following logic: 1) women experience violent crime; 2) they become fearful; 3) they lose their jobs, experience prolonged periods of decreased productivity and absenteeism, refuse high-paying, high-risk night jobs, refrain from using public transportation, etc.; 4) they do not make and spend money in the same way they would without having experienced violent crime. U.S. Br. 6-7. This is the same pattern of attenuated logic envisioned by the Lopez majority that could support the conversion of the commerce power into a general police power with no functional limitations. "Under the theories that the Government presents in support of § 922(q), it is difficult to perceive any limitation on federal

(continued...)

GFSZA could not be upheld pursuant to this Court's cases "upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." Lopez, 514 U.S. at 561 (emphasis added). Petitioners' primary argument appears to be that there was another line of cases, unmentioned by this Court in Lopez, which upholds regulations of activities that are not connected with a commercial transaction but which, viewed in the aggregate, substantially affect interstate commerce. Nothing in Lopez supports that argument.

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[5](...continued)
power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate." Lopez, 514 U.S. at 564.

VAWA rests on the legal fiction that "interstate commerce" need be neither interstate nor commercial. To wit, if any goods or commodities related to the regulated activity cross an interstate boundary at some point -- no matter how remote from the activity itself -- invocation of the clause is justified. Likewise, if the regulated activity influences commercial activity in any way logically connected to commerce that crosses state lines, exercise of commercial power is similarly justified. Unfortunately, engaging in this fiction undermines the moral and legislative authority of Congress and the integrity of the Constitution just as surely as defending slavery based on the fiction that African-Americans were not persons degraded defenders of that ideology. In his dissent in Korematsu, Justice Jackson expressed concern regarding the danger of creative judicial construction. "All who observe the work of courts are familiar with what Judge Cardozo described as 'the tendency of a principle to expand itself to the limit of its logic.'" Korematsu v. United States, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

In declaring that the GFSZA could not be sustained as Commerce Clause legislation, this Court preserved the doctrine of enumerated powers and the notion that the national government's powers cannot be limitless. Madison succinctly described the mechanics of that doctrine:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects as war, peace, negotiation and foreign commerce . . . The powers reserved to the several states will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

The Federalist No. 45 at 292-93 (James Madison) (Clinton Rossiter ed., 1961).

Even the most ardent nationalists among the supporters of the Constitution understood that Congress lacked a general power to pass criminal and social legislation. The Federalist No. 17 at 120 (A. Hamilton) (Clinton Rossiter ed. 1961) ("province of the State governments" included "the ordinary administration of criminal and civil justice"); 2 Debates In The Several State Conventions On The Adoption Of The Federal Constitution 267-68 (Jonathan Elliot ed. 1836) (quoting Alexander Hamilton: the objection that the nation was too diverse for one national government would have greater force if Congress could "new-model the internal policy of any state, . . . alter, or abrogate . . . [a State's] civil and criminal

institutions . . . , [or] penetrate the recesses of domestic life, and control, in all respects, the private conduct of individuals"). This Court always has shared that understanding. Cohens v. Virginia, 19 U.S. 264, 428 (1821) ("Congress cannot punish felonies generally"). Unless we attribute a foolish naivete to those with that understanding, they surely knew that people injured or killed by crime (or any other cause) have a diminished collective ability to participate in the economy, and crime was not unknown to them. But a commerce power that broad would have rendered other powers gratuitous.[6]

Although the proper role of enumerated powers has been questioned numerous times, the initial purpose of the doctrine is well-addressed in Justice Kennedy's Lopez concurrence:

> There is irony in [the Court's uncertainty over its authority to enforce enumerated powers], because of the four structural elements in the Constitution just mentioned, federalism was the unique contribution of the Framers to political science and political theory. See Friendly, Federalism: A Forward, 86 Yale L. J. 1019 (1977); G. Wood, The Creation of the American Republic, 1776-1787, pp. 524-532, 564 (1969). Though on the surface the idea may seem counterintuitive, it was the insight of the Framers that freedom was enhanced by the creation

[6] Indeed, as the briefs of amici Rita Gluzman and Clarendon Foundation describe in greater detail, petitioners' interpretation of the Commerce Clause permits Congress to circumvent the procedural requirements of the Domestic Violence Clause in Article IV, § 4. Cf. Railway Labor Executives Ass'n v. Gibbons, 455 U.S. 457, 468-69 (1982) (Commerce Clause cannot be used to circumvent uniformity requirement appurtenant to the bankruptcy power).

> of two governments, not one. "In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself." The Federalist No. 51, p. 323 (C. Rossiter ed. 1961) (J. Madison).

Lopez, 514 U.S. at 575-576 (Kennedy, J., concurring). Crawford does not ask this Court to create a bright line test. He asks this Court to affirm the doctrine of enumerated powers and its importance to the constitutional structure governing these United States.

II. CONGRESSIONAL FINDINGS DO NOT DISTINGUISH *LOPEZ*

Petitioners offer various ways to "distinguish" Lopez. One is the fact that Section 13981 has "findings" associated with it.

But as both courts below emphasized (Pet. App. 63a, 371a-73a), this Court had findings before it in Lopez. See n.4, supra. In fact, the "findings" concerning gender-based, animus-motivated violence for Section 13981 are quite similar to the findings made by Congress with respect to the GFSZA. Compare 18 U.S.C. § 922(q)(1) with H. Conf. Rep. 103-711 at 385 (1994). Indeed, the only significant difference between them is that the findings for the GFSZA were actually voted upon by Congress; the findings for Section 13981 appear only in a conference report. (It is particularly curious because the findings for

the GFSZA appeared in precisely the same public law as Section 13981. Petitioners offer no explanation as to why one set of findings made it into the U.S. Code and the other did not.)

Moreover, this Court in Lopez considered the government's arguments as to the effects of guns on school grounds on the merits. It did not reject them because Congress had not adopted them, but rather because they would lead to the conclusion that Congress has a plenary police power.

And just as findings generally do not distinguish Lopez, so, too, findings that the states are doing a poor job do not distinguish Lopez. There was just such a "finding" before this Court in Lopez. See n.4, supra. Moreover, as Congress demonstrated with the GFSZA, it is relatively easy for Congress to make a finding that it is dissatisfied with the way the States are handling a particular problem. See, e.g., 15 U.S.C. § 2051(a)(4) (product safety); 15 U.S.C. § 2201(5) (fire prevention requires federal assistance); 16 U.S.C. § 1451(h) (coastal zone management); 20 U.S.C. § 1400(b)(8) (education of handicapped children); 20 U.S.C. § 8331(6) ("writing has been historically neglected in the schools and colleges"); 42 U.S.C. § 4901(a)(3) (control of noise requires federal action); 42 U.S.C. § 5601(a)(8) (juvenile justice systems); 42 U.S.C. § 10801(a)(4) (rights of the mentally handicapped); United States v. Culbert, 435 U.S. 371, 380 (1978) ("Congress apparently believed . . . that the States had not been effectively prosecuting robbery and extortion affecting interstate commerce"). See generally Pet. App. 188a (Wilkinson, C.J., concurring) (such "findings" will "in practice, . . . mean that when the state experimentation that our federal system envisages does not take the precise form

that Congress prefers, Congress can impose a uniform rule").

III. SECTION 13981 CANNOT BE DISTINGUISHED FROM THE GFSZA ON THE GROUND THAT IT DOES NOT DISPLACE STATE POLICY IN AREAS OF TRADITIONAL STATE CONCERN

Petitioners also argue that Section 13981 is distinguishable from the GFSZA because the latter "supplanted" state policies in areas of traditional state concern, and Section 13981 does not. But this argument is both irrelevant and untrue.

A. Petitioners' Argument Is Irrelevant

First, petitioners do not explain how intrusion of a statute into areas traditionally regulated by the states bears on whether it is a constitutional exercise of the Commerce Clause. It is well-settled that if Congress is acting within its enumerated powers, it may regulate in areas of traditional state concern. United States v. Culbert, 435 U.S. at 379 (Hobbs Act punished conduct already punishable under state robbery and extortion statutes; maxim against upsetting federal-state balance applies only when the statute is ambiguous and, in the Hobbs Act, "there is no question that Congress intended to define as a federal crime conduct that it knew was punishable under state law"). Indeed, its power to regulate commerce has always been held to be plenary. Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276 (1981) ("This power is 'complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution" quoting Gibbons v.

Ogden, 22 U.S. 1 (1824)).[7]

Indeed, Brzonkala seems to concede as much, but suggests that perhaps Congress only has "concurrent" jurisdiction in such traditional areas. Brzonk. Br. 33-34. That position is untenable. When Congress is acting within its powers, it can preempt state law pursuant to its authority under Article VI. City of New York v. F.C.C., 486 U.S. 57, 63 (1988) ("When the Federal Government acts within the authority it possesses under the Constitution, it is empowered to pre-empt state laws to the extent it is believed that such action is necessary to achieve its purposes. The Supremacy Clause of the Constitution gives force to federal action of this kind . . . "); Aloha Airlines v. Director of Taxation Of Hawaii, 464 U.S. 7, 14 n.10 (1983) (Federal law preempted state taxation of airlines; "Congress clearly has the authority to regulate state taxation of air transportation in interstate commerce"); Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) ("The first inquiry is whether Congress, pursuant to its power to regulate commerce . . ., has prohibited state regulation of the particular aspects of commerce involved in this case . . . [W]hen Congress has 'unmistakably . . . ordained' . . . that its enactments alone are to regulate a part of commerce, state laws regulating that aspect of commerce must fall" (emphasis added)).

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[7] Just as there is no "domestic relations" exception in Article III of the Constitution governing federal court jurisdiction (Ankebrandt v. Richards, 504 U.S. 689 (1992)), Article I does not preclude Congressional regulation of that area if Congress is acting within its enumerated powers. See, e.g., Amici Brief of NYC Bar Ass'n, et al., 8-9.

B. Section 13981 Displaces State Policy In Areas Of Traditional State Concern

If displacement of state policies were relevant to the determination of the scope of Congressional power under the Commerce Clause, it would further militate against Section 13981. Petitioners claims that the GFSZA imposed significantly on state sovereignty, but, as the court below found, the GFSZA did not generally intrude on state policy. Pet. App. 42a n.10. Intrusion occurred only in the limited sense that individuals in states that had no rule concerning possession of guns around schools might be subject to criminal liability (if their guns were not state-licensed). Section 13981 does exactly the same thing, and more so. Pet. App. 44a. And it does it in the area of civil tort law, a traditional area of state regulation. Pet. App. 41a, 73a-74a, 205a (Niemeyer, J., concurring). See also Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984) (recognizing "the States' traditional authority to provide tort remedies to its citizens"). For example:

* An individual with a claim time-barred under state law can still seek redress under Section 13981 (even in state court) because the four-year statute of limitations displaces the statute of limitations a state would apply to gender-based animus-motivated violent torts. Those state statutes of limitations reflect the state's weighing of the competing interests of providing remedies and avoiding stale evidence. Cf. Guaranty Trust Co. v. York, 326 U.S. 99 (1945) (federal courts should apply state statute of limitations when applying state law in federal court pursuant to diversity jurisdiction).

* States that conclude that attorneys' fee awards largely available only to plaintiffs cause unnecessary

litigation cannot prevent such litigation between its citizens where a plaintiff can allege a gender-based animus-motivated tort under Section 13981. See Richard Posner, Economic Analysis Of Law 576 (4th ed. 1992) ("indemnity [of attorneys' fees] in favor just of plaintiffs encourages [nuisance suits]").

* Some of petitioners' amici report that states have been limiting the amount of punitive damages awards that can be obtained in tort cases. See Amici Brief of Nat'l Network To End Domestic Violence, et al. ("Nat'l Network Amici Br."), 14, 15 & n.38. Section 13981 precludes states from enforcing that tort policy.

* Consensual sex with a minor is prosecuted criminally everywhere, but some states consider consent a defense to a civil action on the theory that the law may otherwise encourage underage girls to have sex and sue for damages. E.g., Michelle T. v. Crozier, 173 Wisc. 2d 681, 685, 495 N.W.2d 327, 329 (1993); Barton v. Bee Line, 238 A.D. 501, 265 N.Y.S. 284 (App. Div. 1933). Cf. L.K. v. Reed, 631 So. 2d 604, 607 (La. App. 1994) (comparative fault based upon consent). These efforts to lower the incentives for premature sex by underage girls can be circumvented by a Section 13981 lawsuit because the federal law permits a civil suit for any felony against the person. (The lower courts generally hold that statutory rape is an "act of violence" under 18 U.S.C. § 16. E.g., United States v. Velazquez-Overa, 100 F.3d 418, 419-20 (5th Cir. 1996); United States v. Riley, 183 F.3d 1155, 1160-61 (9th Cir. 1999); cf. United States v. Shannon, 110 F.3d 382, 387-88 (7th Cir. 1997) (same result under

Sentencing Guidelines).)[8]

Section 13981 also displaces the state policy decisions implicit in laws governing the intersection of torts and intrafamilial relationships. Section 13981(d)(2)(B) states that plaintiffs can sue for acts that would be felonies "but for the relationship between the person who takes such action and the individual against whom such action is taken." This "ignore the relationship" mandate has some startling consequences:

* While virtually no state gives parents "immunity" from serious tortious conduct anymore (see Herzefeld v. Herzefeld, 732 So.2d 1102, 1103 & 1103-04 n.2 (Fla. App.), review granted, 740 So. 2d 528 (1999)),[9] the common law usually recognizes that the parental relationship creates certain privileges concerning corporal punishment that do not exist between strangers. Restatement (Second) of Torts, § 895G, comment k (1979) (recognizing the "privilege of parental discipline"; the "intimacies of family life also involve intended physical contacts that would be actionable between strangers but

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[8] Determination of whether a particular crime is an "act of violence" is done on a categorical, rather than case-by-case, basis. Velazquez-Overa, 100 F.3d at 420-21.

[9] Interestingly, the Herzefeld court indicates that Louisiana is the only state with a parental immunity doctrine. Herzefeld, 732 So. 2d at 1103-04 n.2. In fact, Louisiana appears to have a tolling provision precluding suit only while the child is a minor. Steele v. Steele, 732 So. 2d 546, 548 (La. App. 1999) (immunity for torts lasts until minor reaches maturity, but statute of limitations is tolled). Cf. Duplechin v. Toce, 497 So. 2d 763, 765 (La. App. 1986) (Louisiana recognizes marital immunity only during time of marriage; wife can sue husband for beating her after divorce becomes final). Of course, Section 13981 displaces that state tolling policy.

may be commonplace and expected within the family"). The mother who, believing boys are more troublesome and in greater need of discipline than girls, and gives corporal punishment only to her sons, will not receive the benefit of that common-sense rule under the mandate of Section 13981(d)(2)(B) that relationships must be ignored. (Battery against a minor is considered a felony in many jurisdictions. E.g., Ariz. Rev. Stat. Ann. §§ 13-1204(A)(6), 13-1204(B) (West 1989)).

* Similarly, while marital immunities for serious harms are rare (see Brief of Amicus State of Alabama (Appendix); Nat'l Network Amici Br. 14), presumptions often underlie sexual contact within the marriage relationship. Restatement (Second) of Torts, § 895F, comment h (1979) ("concept of consent to an intentional physical contact carries a much broader scope of application within the marital relationship than it does for other parties").[10] The ignore-the-relationship mandate of Section 13981 could lead to claims of animus-based sexual torts for any unwanted sexual touching (which, again, usually constitutes a felony between strangers) within a

[10] Similarly, state criminal laws recognize certain exemptions for less severe sexual contact that would be felonious between unmarried individuals. Ariz. Rev. Stat. Ann. §§ 13-1401.5(b), 13-1404, 13-1406.01(A), 13-1407(D) (West 1989 & Supp. 1998) (spouses exempt from prohibitions against, inter alia, sexual contact without consent, including while victim is asleep); Conn. Gen. Stat. Ann. §§ 53a-51, 53a-65, 53a-70b, 53-72a (West 1994 & Supp. 1999) (spouses exempt from felony of sexual contact by use of force or attempted sexual contact by use of force); Wash. Rev. Code Ann. §§ 9A.44.050, 9A.44.100 (West 1988 & Supp. 1999) (spouses exempt from "indecent liberties" felony); Wyo. Stat. §§ 6-1-304, 6-2-304, 6-2-307 (Michie 1997) (marriage is defense to felony of attempt at sexual contact by force).

marriage.

* As certain amici unartfully mention (see Amici Brief For Lawyers' Committee Under Civil Rights, et al. 8), most states provide exemptions to their statutory rape laws for married couples, recognizing that couples with a retarded or underage wife would be forbidden by state law from having sexual relations. Section 13981's requirement that the relationship be ignored permits a woman in such a marriage to claim that her animus-motivated husband's consensual sex with her constituted "statutory rape" at any time within the generous statute of limitations provided.

Finally, Section 13981 displaces state prerogative by elevating the importance of gender-based animus-motivated crime. That was its purpose, of course. S. Rep. 103-138 at 50 (1993) (send a "special societal judgment"). But it is hardly an uncontroversial one. Many think that singling out certain motivations for special treatment improperly diminishes the importance of identical crimes with different motivations (even different "hate-based" motives not included in the statute), leads to the balkanization of American society, or creates other problems. E.g., James B. Jacobs & Kimberly Potter, Hate Crimes: Criminal Law And Identity Politics 8 (1998); Hearings Before The House Judiciary Committee on H.R. 1082 (August 4, 1999), 1999 WL 20011034 (Statement Of Daniel E. Troy) (hate crimes moves away from Biblical and constitutional requirements of equal treatment); id., 1999 WL 20011043 (Statement of Heidi M. Hurd) (creates unique mens rea issues inconsistent with criminal law and punishes bad character). Perhaps these arguments are persuasive, perhaps not. But Section 13981 displaces a state's decision not to send a signal that gender-based animus-motivated crime within its jurisdiction is different

from other serious crime against women (or anyone else) -- just as the GFSZA displaced a state's policy not to give special attention to the possession of guns in school zones.

Just after insisting that Section 13981 is a "model of cooperative federalism," (Brzonk. Br. 34), though, Brzonkala insists that Section 13981 "addresses a problem of national dimension with national consequences." Id. 35. The same could be said about violence in schools. "National" problems (in the sense that they occur in many places) are not always problems of "interstate commerce." Pet. App. 207a-08a (Niemeyer, J., concurring).

IV. LOPEZ CANNOT BE DISTINGUISHED ON THE GROUND THAT SECTION 13981 IS A CIVIL REMEDY OR A CIVIL RIGHTS LAW

The United States asserts that this Court placed great emphasis on the fact that the GFSZA was a criminal statute. U.S. Br. 33-34. See also Brzonk. Br. 33-34. In fact, this Court has never differentiated between civil and criminal law in assessing the scope of Congress's power to regulate "commerce among the states." See Pet. App. 373a-74a. And, as shown above, civil law has the same capacity to interfere with state policy choices as criminal law.

Petitioners also insist that Section 13981 is civil rights legislation "in the classic sense." U.S. Br. 34. They assert that because "civil rights" is an historic function of the federal government -- albeit one in which Congress took an extended leave of absence (Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 245 (1964) (82-year gap between civil rights legislation) -- any legislation with that label cannot possibly invade an area of traditional state

regulation. U.S. Br. at 34-35; Brzonk. Br. 35. They conveniently ignore that gun control has also been an historic federal function. See United States v. Lopez, 2 F.3d 1342, 1348-59 (5th Cir. 1993) (describing that history), aff'd, 514 U.S. 549 (1995); Pet. App. 74a n.17.

Petitioners do not define "civil rights" (much less "civil rights in the classic sense"), except to imply that it does not include the right of schoolchildren to go to violence-free schools. It is a phrase not only absent from the Constitution, but difficult to define when used elsewhere (as in 28 U.S.C. § 1343(4)). Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 620-21 (1979) ("Arguably, a statute that is intended to provide at least a minimum level of subsistence for all individuals could be regarded as securing . . . 'civil rights.' We are persuaded, however, that . . . th[is] term[] ha[s] a more restrictive meaning as used in the jurisdictional statute"); Dawson v. Myers, 622 F.2d 1304, 1309 n.6 (9th Cir. 1980) ("unclear" whether due process and equal protection claims based on Medicaid eligibility rules were "civil rights" claims for purpose of Section 1343(4)), vacated on other grounds, Beltran v. Myers, 451 U.S. 625 (1981).

In any event, providing damages remedies for invasions of bodily integrity is a "civil right" that the common law has recognized since prior to the founding of this country. Pet. App. 41a, 73a-74a, 205a (Niemeyer, J., concurring). Defining a subset of such invasions, like gender-based and animus-motivated invasions of bodily integrity, does not change that at all.

* * *

The Commerce Clause is a source of great federal

authority. Today, though, Congress threatens to be use it as the plenary police power that the Constitution withheld. Congressional willingness to stretch the Commerce Clause as an expedient tool to reach societal problems is not unique to Section 13981, or even confined to any particular political view. Recently, it has been used to threaten to regulate partial-birth abortions and doctor-assisted suicide, as well as violence against women. But that only underscores the importance this Court plays in preserving our constitutional structure.

V. SECTION 13981 IS NOT PROPER LEGISLATION TO ENFORCE THE FOURTEENTH AMENDMENT

As the Fourth Circuit correctly held, United States v. Harris, 106 U.S. 629 (1883) and the Civil Rights Cases, 109 U.S. 3 (1883) preclude the conclusion that Section 5 of the Fourteenth Amendment authorized Congress to pass Section 13981. The legislative history of the civil rights statutes at issue in those cases, described in detail by the Fourth Circuit, demonstrates that Congress was trying to remedy the failure of states to enforce the rights of African Americans like Morrison and Crawford. See also Alfred Avins, The Civil Rights Act of 1875 And *The Civil Rights Cases* Revisited: State Action, The Fourteenth Amendment, And Housing, 14 UCLA L. Rev. 5, 15 (1966) (there were "numerous complaints throughout the debates [on the 1875 Civil Rights Act] that the common law remedy was of no avail because Negroes could not get equal justice in state courts"); John Harrison, Reconstructing The Privileges Or Immunities Clause, 101 Yale L.J. 1385, 1425-26 (1992) (Civil Rights Act of 1875 was passed, in part, because "many Republicans believed that the states were not enforcing the common law rule of nondiscrimination, but were instead permitting common carriers to violate it at the

expense of blacks").

Petitioners' efforts to distinguish Harris and the Civil Rights Cases basically assumes that this Court was unaware of that history. But, as the Fourth Circuit recognized (Pet. App. 121a-22a n.27), this Court specifically stated in the Civil Rights Cases that it "carefully considered" the "arguments of distinguished senators, advanced while the law was under consideration, claiming authority to pass it by virtue of [the Fourteenth] [A]mendment." Civil Rights Cases, 109 U.S. at 10. That, in and of itself, was unusual because this Court rarely made references to any legislative history until after the Civil Rights Cases was decided. Gregory E. Maggs, The Secret Decline Of Legislative History: Has Someone Heard A Voice Crying in the Wilderness?, 1994 Pub. Int. L. Rev. 57, 63 & n.21 (Roger Clegg and Leonard Leo, eds. 1994) ("The Supreme Court began to cite legislative history as we now know it around the close of the nineteenth century," citing cases from the 1890s).[11]

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[11] The United States also asserts that this Court declared the 1871 Act unconstitutional because it used the words "equal protection" in the context of a law against private parties. U.S. Br. 46. As the early drafts of Section 13981 demonstrate, Congress still occasionally uses words from the Fourteenth Amendment like "equal protection" or "privileges and immunities" when describing laws that primarily reach private conduct. S. Rep. 101-545 at 23. See also, e.g., 29 U.S.C. § 2601(b)(4) (although neither Congress nor private individuals are subject to the Fourteenth Amendment, Congress expresses concern that goals of the Family and Medical Leave Act, largely applicable to private employers, be "accomplish[ed] . . . consistent with the Equal Protection Clause of the Fourteenth Amendment, minimiz[ing] the potential for employment discrimination on the basis of sex"). More important, this Court has specifically held that there is "nothing inherent in the phrase [equal protection] that requires the action

(continued...)

This Court recently upheld the Section 5 analysis of Harris and the Civil Rights Cases. City of Boerne, 521 U.S. at 524-25 (Section 5 analysis of, inter alia, the Civil Rights Cases and Harris "has not been questioned"); id. at 545-46 (O'Connor, J., dissenting) (agreeing with Court's Section 5 analysis). Given that, the Fourth Circuit's conclusion that Section 13981 cannot be sustained as an exercise of Congress's authority under Section 5 of the Fourteenth Amendment was correct.

VI. THE AMENDED COMPLAINT FAILS TO STATE A CAUSE OF ACTION UNDER SECTION 13981

Crawford was completely successful in the court below, and thus could not file a cross-petition. Northwest Airlines, Inc. v. County of Kent, 510 U.S. 355, 365 n.8 (1994). Nonetheless, as set forth in his opposition to the petition for certiorari (Cert. Opp. 10 n.3), he may raise any argument properly raised that would support the judgment of the courts below. This Court may affirm on any such ground. County of Kent, 510 U.S. at 364; Thigpen v. Roberts, 468 U.S. 27, 30 (1984) (affirming on ground not relied upon by the court below and not addressed in the petition for certiorari).

Here, a reasonable statutory construction could avoid a constitutional question. Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council, 485 U.S. 568, 575 (1988). This Court may and should apply a narrowing construction to Section 13981 so

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[11](...continued)
working the deprivation to come from the State." Griffin v. Breckenridge, 403 U.S. 88, 97 (1971), citing Harris, 106 U.S. at 643.

as to avoid the constitutional questions while affirming the judgment of the Courts below. Moreover, a narrow construction is proper when a federal statute purports to regulate in an area traditionally governed by state law. United States v. Bass, 404 U.S. 336, 349 (1971) ("unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance").

The courts below reached the constitutional questions because they concluded that the amended complaint stated a claim against Morrison. They never reached the question of whether the amended complaint stated a claim against Crawford. In fact, it does not state a claim against either Morrison or Crawford, and the judgment in their favor can be affirmed on that ground.

Brzonkala alleges that Crawford raped her. No comments are attributed to him and there is nothing in the complaint from which an animus based on gender can be attributed to Crawford. All rapes evince a lack of respect for the victim as an individual. Not all of them evince a lack of respect for women as a gender (as Congress recognized in the legislative history of the Act), much less are they all motivated by an animus against women. There are many motivations for rape other than gender animus, generalized anger and sexual self-indulgence being perhaps only the most obvious.

The dissent in the court below concluded that a claim was stated against Crawford because Brzonkala alleges that Crawford conspired with Morrison to rape her, and statements by Morrison thus could be attributed to Crawford. Pet. App. 223a. The cases cited by the dissent to support this proposition all stand for the proposition that statements made in furtherance of a conspiracy can be

attributed to co-conspirators. Morrison's statements came after the completion of the objective of this purported conspiracy, and cannot even plausibly be considered statements made in furtherance of it. After all, the statements are being used to identify Morrison's motive. No law requires that everyone in a conspiracy have the same motive.

Even if those statements could be attributed to Crawford, it does not matter because those statements do not indicate any gender-animus on the part of Morrison at the time that he allegedly committed the acts in question. The first of the two alleged comments ("you better not have any f***g diseases") does not evince gender-animus at all, but rather a concern for self-preservation. The second purported comment ("I like to get girls drunk and f**k the s**t out of them"), even if it evinced such animus, is alleged to have been said at some unspecified time in the five months after the purported rape. (Its connection to this case is unclear since Brzonkala steadfastly asserts that she was not drunk on the night of her alleged attack.) Even reading the allegations of the amended complaint liberally, it is asking too much to assume that any gender-animus comments that a defendant ever has uttered can be used to demonstrate gender-animus at the time of the purported act in question.

It is no doubt correct that an explicit statement of hatred of women is unnecessary, but something more than the slim allegations of the amended complaint should be required. Without such a requirement, Section 13981 will become the general law against rape that Congress sought to avoid.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

ANTONIO MORRISON AND
JAMES LANDALE CRAWFORD,

Respondents.

CHRISTY BRZONKALA,

Petitioner,

v.

ANTONIO MORRISON AND
JAMES LANDALE CRAWFORD,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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QUESTIONS PRESENTED

1. Is a federal law that provides a civil remedy for a victim of a violent felony, perpetrated by a private individual motivated by an animus based upon gender, a law within Congress's power to regulate "commerce with foreign nations, among the several states, and with the Indian tribes"?

2. Is a federal law that provides a civil remedy for a victim of a violent felony, perpetrated by a private individual motivated by an animus based upon gender, a law within Congress's power to enforce the constitutional provision stating that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws"?

3. Did the amended complaint in this action state a claim pursuant to that federal law, 42 U.S.C. § 13981?

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STATEMENT OF THE CASE

A. Statutory Background

The amended complaint in this action sought a remedy pursuant to 42 U.S.C. § 13981 ("Section 13981"), which is the main part of Subtitle C ("Subtitle C") of Title IV of Public Law 103-322. Title IV is often referred to as the Violence Against Women Act ("VAWA").

Subtitle C provides a tort remedy for a "crime of violence motivated by gender." 42 U.S.C. § 13981(c). Gender-motivated violence is a term of art defined to mean "a crime of violence committed because of gender or on the basis of gender, *and* due, at least in part, to an animus based on the victim's gender." 42 U.S.C. § 13981(d)(1) (emphasis added). The gender-*motivated* violence that a plaintiff must state and prove, thus, has *two* independent requirements: (1) the crime of violence must be perpetrated on the basis of gender and (2) the act must be motivated by a gender-based animus. *Gustafson v. Alloyd Co.*, 513 U.S. 561, 574 (1995) (Court should "avoid a reading which renders some words altogether redundant."). *See also* Amicus Brief Of Senator Joseph Biden ("Biden Amicus Br."), 16.

Congress made clear that Subtitle C did not cover all rapes or violent attacks against women. *See* S. Rep. 103-138 at 51 (1993) (the civil remedy "does not create a general Federal law for all assaults or rapes against women"); Biden Amicus Br. 17 (quoting statement of Senator Hatch). So, too, the "author of VAWA" (Biden Amicus Br. 1) made clear that Subtitle C, *even prior to the addition of the "animus" requirement in 1993* (*see* Biden Amicus Br. 16-17), did not cover most cases of domestic violence. S. Rep. 102-197, at 69 (1991) (the civil remedy "does not cover everyday domestic violence cases . . . This is stated clearly in the committee report and it is the only fair reading of the statutory language") (Statement by Sen. Biden).

Although it is said to respond to "systemic" bias in state courts, Subtitle C gives state courts concurrent jurisdiction. 42 U.S.C. § 13981(e)(3). Moreover, if a claim is brought in state court, neither party may remove. 28 U.S.C. § 1445(d); Pub. L. 103-322, § 40302(e)(5). Prevailing plaintiffs in claims brought under Section 13981 are entitled to recover their reasonable attorneys' fees. *See* 42 U.S.C. § 1988(b); Pub. L. 103-322, § 40303.

The four-year statute of limitations set forth in 28 U.S.C. § 1658 would apply to any claim under Section 13981. This is longer than the limitations periods for intentional torts in Virginia and most other states. Va. Code Ann. § 8.01-243 (Michie's 1996) (two years).

B. Legislative History

1. Subtitle C. -- A civil remedy like that in Subtitle C was first proposed in 1990 in S. 2754. Biden Amicus Br. 2. The proposal declared (in Section 301(b)) that all persons within the United States had a "right[], privilege[], or immunit[y]" to be free from "crimes of violence overwhelmingly motivated by the victim's gender," and provided a cause of action (in Section 301(c)) against those who deprive another of the rights, privileges, and immunities "secured by the Constitution and laws as enumerated in subsection (b)." S. Rep. 101-545 at 23.[1] The report declared that Congress had the right to pass such a law pursuant to "the commerce clause, the fourteenth amendment, the right to travel, and other rights protected by the privileges and immunities clause." *Id.* at 43.

[1] The word "overwhelmingly" served little purpose since "a crime of violence overwhelmingly motivated by . . . gender" was defined as a "crime of violence . . . motivated by gender." *Id.* (§ 301(d)).

The U.S. Justice Department opposed this first version of Subtitle C. *See* Letter from Bruce C. Navarro, Deputy Assistant Attorney General, To Honorable Joseph R. Biden Dated October 1990 (Lodged Doc. No. 1), 6-8. (Twelve copies of all "lodged" documents have been lodged with the Clerk of the Court.) Noting that the bill "appear[ed] to be predicated upon the Fourteenth Amendment," the Justice Department was "concerned that a cause of action based on acts that were not committed under color of state law may be unsupported by the Constitution . . . [W]e are unable to discern the authority for reaching purely private action." *Id.* at 8.

S.15 was introduced the next year in the 102nd Congress. Biden Amicus Br. 2. In April 1991, the Justice Department reiterated its objections to Subtitle C. *See* Letter from Bruce C. Navarro, Deputy Assistant Attorney General, To Honorable Joseph R. Biden Dated April 9, 1991 (Lodged Doc. No. 2), 14. Around that same time, one of Brzonkala's current attorneys testified, proposing the addition of "findings" so that Subtitle C could be validated pursuant to the Commerce Clause and Section 5 of the Fourteenth Amendment. *Violence Against Women: Victims Of The System: Hearing Before The Senate Judiciary Committee On S.15*, 102nd Cong. 104 (1991) (testimony of Cass Sunstein) (Subtitle C should be amended because "[t]here is nothing in [it] that refers to commerce at all, which I believe is a mistake, because the court likes to see findings both in the statute and the history"); *id.* 104-05 (avoid Justice Department's Fourteenth Amendment concern by amending statute to find that Congress is responding to state biases); *id.* 106-24 (Statement of Cass Sunstein). *See also* Pet. App. 151a-52a & n.32. The next version of S.15 contained a proposed civil remedy that had findings reflecting these suggestions. S. Rep. No. 102-197 at 27-28.

In the 103rd Congress, a new version of VAWA was introduced, with a civil remedy similar to Section 13981. S. Rep. No. 103-138 at 29-31. For the first time, the phrase "crime of violence motivated by gender" was defined to include an "animus" requirement, thus significantly limiting the acts covered under the statute. *Id.* at 30, 50. Biden Amicus Br. 16-17. Although the new definition substantially narrowed the scope of the covered conduct, Congress later heard no testimony at all about the specific acts covered under the revised provision, and how those acts might affect interstate commerce. Indeed, the Senate Committee report purporting to justify the constitutionality of the civil remedy referred to the effect of *all* gender-*based* violent crimes (ignoring the fact that the proposal now only covered such crimes that were *also* animus-motivated). S. Rep. No. 103-138 at 54-55. Concluding that Congress could regulate anything "that has even the slightest effect on interstate commerce" (*id.* at 54), the report found that the bill was within Congress's authority.

As the United States notes (U.S. Br. 11 n.5), state officials weighed in on both sides of the proposal. *See also* Conference Of Chief Justices Resolution IX on Violent Crime Control and Law Enforcement Act of 1994 (Lodged Doc. No. 3) (opposing Senate version of H.R. 3355, *i.e.*, S.15, because it "would result in the . . . inefficient use of the special but limited resources of the federal courts" and "assumes without foundation that states have been unresponsive and ineffective in addressing crime"). The Judicial Conference of the United States opposed early versions of VAWA. It continued to express concerns throughout consideration of the proposals by Congress. Report Of The Proceedings Of The Judicial Conference Of The United States, September 20, 1993, 59-60 (Lodged Doc. No. 4) (reiterating concerns expressed in 1991 resolution opposing earlier version of VAWA and "general

concerns with the trend in Congress to federalize traditional state crimes and causes of action").

2. Hate Crimes. -- A brief examination of recent proposals to expand 18 U.S.C. § 245, the federal hate crime statute, illuminates a much different view of the "pervasive" state bias petitioners rely upon. These proposals would include gender-based (but not necessarily animus-motivated) willful inflictions of bodily injury under Section 245, as well as those based upon disability and sexual orientation. (The proposals also expand coverage of acts based upon race, color, national origin, and religion.)

First, all of the proposals to expand Section 245 require, unlike Section 13981, a specific jurisdictional nexus between any gender-based conduct and interstate commerce. *See* S. 1529, 105th Cong. § 4(2) (proposed § 245(c)(2)(B)); H.R. 3081, 105th Cong. § 4(2); S. 622, 106th Cong. § 4(2); H.R. 77, 106th Cong. § 4(2); H.R. 1082, 106th Cong. § 4(2). According to the Justice Department officials, the purpose of the jurisdictional element is to avoid becoming "mired in constitutional litigation." *The Hate Crimes Prevention Act of 1998: Hearing Before The Committee On The Senate Judiciary Committee On S.J. Res. 1529*, 105th Cong. 18 (1998) ("*1998 Senate Hate Crimes Hearings*") (Statement of Deputy Attorney General Eric Holder); *Hearings Before The House Judiciary Committee On H.R. 3081* (July 22, 1998) ("*1998 House Hate Crimes Hearings*"), 1998 WL 514008 (Statement of William Lann Lee) ("*Lee Statement*"), "Interstate Commerce Requirement"; *Hearings Before The House Judiciary Committee on H.R. 1082* (August 4, 1999) ("*1999 House Hate Crimes Hearings*"), 1999 WL 20011032 (Statement Of Eric Holder) ("*Holder 1999 Statement*"), "Federalization and Jurisdiction." *See also 1998 Senate Hate Crimes Hearings* 65, 66 (Holder responding to questions from Sens. Ashcroft and

Torricelli). Even with required ties to interstate commerce, some scholars questioned whether a weak nexus would be sufficient to avoid constitutional difficulties. *E.g.*, *1998 House Hate Crimes Hearings*, 1998 WL 12763003 (Statement of John C. Harrison). *Compare United States v. Jones*, 178 F.3d 479, 480 (7th Cir. 1999) ("pretty slight" connection to interstate commerce met jurisdictional nexus under arson statute and was constitutional), *cert. granted*, 1999 WL 699893 (U.S. November 15, 1999).[2]

Second, none of the proposals find that states have engaged in bias against women. In fact, Justice Department officials repeatedly have emphasized that state and local jurisdictions would retain the primary role for all "hate crimes." *1998 Senate Hate Crimes Hearings* 7, 8, 10 (Testimony of Eric Holder), 13 (Holder Statement), 64 (Holder response to written questions from Sen. DeWine); *Lee Statement*, "Overview"; *Holder 1999 Statement*, "Gaps In Current Law." Local law enforcement officials would also handle "virtually all gender-motivated hate crimes." *1998 Senate Hate Crimes Hearings* 17 (Holder Statement); *Lee Statement*, "Gender"; *Holder 1999 Statement*, "Gender." *See also 1998 Senate Hate Crimes Hearings* 67 (Holder responses to questions from Sen. Torricelli). The Justice Department testified that "[s]tate and local officials

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[2] Brzonkala's lawyer testified again about the Fourteenth Amendment, somewhat more cautiously than in his VAWA testimony, and again urged additional findings. *1998 House Hate Crimes Hearings*, 1998 WL 514016 (Statement of Cass Sunstein) ("there is a plausible argument that Congress can reach private conduct under the fourteenth amendment, but the current Supreme Court is not likely to accept this argument" and a "plausible" argument that Congress can reach private conduct because of state failures "to provide acceptable (or equal) protection against hate crimes, but this argument should depend on explicit findings and a good factual record"). To date, no proposal contains such findings.

are on the front lines and do an enormous job in investigating and prosecuting hate crimes that occur in their communities" (*Holder 1999 Statement*, "Prosecutions: Current Law"). Rather than a reaction to state biases or inadequacies, the legislation was needed primarily so that federal officials could "work effectively as partners with State and local law enforcement officials." *1998 Senate Hate Crimes Hearings* 7 (Holder Testimony); *Lee Statement*, "The 'Federally Protected Activity' Requirement"; *Holder 1999 Statement*, "Federalism."

Finally, the hearings have disclosed that, even without any "animus" requirement, "hate crimes" in general are relatively unusual events. *E.g.*, *1998 Senate Hate Crimes Hearings* 7 (Holder Testimony) (adding gender, disability, and sexual orientation as categories would result only in a "modest increase" in the average of six federal prosecutions per year under the Section 245); *id.* 64 (Holder responding to questions from Sen. DeWine) ("the number of federal prosecutions of gender-motivated hate crimes would be limited"). In fact, although 18 U.S.C. § 2241 covers a wide array of sexual assaults in federal enclaves and territories, and current sentencing guidelines permit enhancements whenever a victim is selected because of gender (*without* any "animus" showing required) -- *see* Public Law 103-322, § 280003(a) (note to 28 U.S.C.A. § 994 (West. Supp. 1999) at 115) -- the Justice Department has apparently *never* sought a sentence enhancement for gender-based crime. *1998 Senate Hate Crimes Hearings* 64 (Holder responding to questions from Sen. DeWine). *Compare 1998 House Hate Crimes Hearings*, 1998 WL 12763006 (Testimony of Richard Devine, Illinois County State's Attorney) (describing sentence enhancement state prosecutors obtained against animus-motivated serial rapist).

C. Factual Allegations

The order of the court below affirmed a judgment of the District Court dismissing the action upon a Rule 12(b)(6) motion for failure to state a claim. For purposes of this brief, then, respondent Morrison must assume the truth of the allegations in the amended complaint ("Am. Com.") in this action. Accordingly, Morrison adopts the "facts" in the Brief of the United States ("U.S. Br.") 11-12.

D. Proceedings In The Courts Below

The original complaint was filed on or about December 27, 1995, the amended complaint shortly thereafter. Plaintiff Brzonkala asserted claims against Morrison and Crawford under Subtitle C and under state tort law. Defendants Morrison and Crawford moved to dismiss the amended complaint, and the United States intervened to defend the constitutionality of Subtitle C. The District Court dismissed Brzonkala's claims under Section 13981 in an order and judgment dated July 26, 1996. It declined to exercise supplemental jurisdiction over the state law claims, and dismissed them without prejudice. Pet. App. 402a-03a.

On December 23, 1997, a divided panel of the Fourth Circuit reversed the decision of the District Court. It held that Subtitle C was a legitimate exercise of Congress's Commerce Clause power. Pet. App. 282a. On February 2, 1998, the full court vacated the opinion of that panel and ordered the case reheard *en banc* in March 1998. Pet. App. 13a. One year later, the full court affirmed the judgment of the District Court.

Although the District Court and the *en banc* Court of Appeals took slightly different approaches, each arrived at the same conclusion. With respect to the Commerce

Clause, the first enumerated power on which petitioners relied, the District Court considered factors it gleaned from this Court's opinion in *United States v. Lopez*, 514 U.S. 549 (1995), holding that Congress exceeded its authority under the Commerce Clause in passing 18 U.S.C. § 922(q), the Gun-Free School Zones Act ("GFSZA"). The District Court compared the similarities and differences between Subtitle C and the GFSZA with respect to those factors, and concluded that the similarities outweighed the differences. Pet. App. 365a-376a. The Fourth Circuit focused on the non-economic nature of the conduct: it concluded from *Lopez* that the non-economic nature of the activity being regulated was an important, if not dispositive, factor in defining the outer limits of the phrase "substantially affects interstate commerce." Pet. App. 18a-20a & 20a-22a n.5. It concluded that whether the non-economic nature of the activity rendered the statute dispositively unconstitutional or only presumptively so was not of consequence in this case because any other factors also weighed against the statute's constitutionality. Pet. App. 31a-51a.

With respect to Section 5 of the Fourteenth Amendment, the District Court applied a means/ends analysis derived from *Katzenbach v. Morgan*, 384 U.S. 641 (1966), and concluded that Subtitle C was not "plainly adapted" to correct state bias. Pet. App. 399a-401a. The *en banc* Court of Appeals, on the other hand, first focused more closely on this Court's opinions in *United States v. Harris*, 106 U.S. 629 (1883) and the *Civil Rights Cases*, 109 U.S. 3 (1883). It analyzed each case, and the legislative history of the statute at issue in each one, in detail. Pet. App. 104a-111a, 119a-21a, 124a-25a. The Fourth Circuit concluded that the constitutionality of Subtitle C was controlled by those precedents. Nonetheless, it also applied *City of Boerne v. Flores*, 521 U.S. 507 (1997) and engaged in a "means/ends" analysis to determine if Subtitle

C was appropriate prophylactic legislation for enforcing likely Section 1 violations. It concluded that the legislative history did not demonstrate the kind of purposeful discrimination by state actors required for prophylactic legislation, Pet. App. 151a-60a, and also that there was no "congruence and proportionality" between Section 13981 and any violation of the Equal Protection Clause (Pet. App. 160a-63a).

E. The State Court Actions

Shortly after the dismissal of the action in the District Court, Brzonkala commenced an action in the Circuit Court of the City of Chesapeake against Morrison and Crawford for, *inter alia*, common law assault and battery. City of Chesapeake Circuit Court At-Law No. CL96-814. The "motion for judgment" (Virginia's version of a complaint) noted the dismissal of the federal action and stated that "[p]laintiff will not appeal the federal court's dismissal of her common-law claims, but rather brings those common-law claims under the exclusive jurisdiction of this honorable Court." Lodged Doc. No. 5 ¶ 14. Plaintiff later voluntarily moved to non-suit that action, it was dismissed on August 26, 1997, and she has not refiled it. Lodged Doc. No. 6. A separate state lawsuit, filed in the Circuit Court of Montgomery County (Case No. V-10569) and alleging that Morrison, Crawford, and another student, *inter alia*, interfered with Brzonkala's contract with Virginia Tech by falsely testifying at University hearings, was also non-suited and not refiled. *See* Lodged Docs. 7-8.[3]

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[3] Although these proceedings are not in the record (Pet. App. 191a (Niemeyer, J., concurring)), this Court may take judicial notice of official proceedings in another court. *E.g.*, *Burbank-Glendale-Pasadena Airport Authority v. City of Burbank*, 136 F.3d 1360, 1364 (9th Cir. 1998); *Opoka v. Immigration and Naturalization Service*, 94 F.3d (continued...)

SUMMARY OF ARGUMENT

The Constitution created a federal government of enumerated powers "to ensure protection of our fundamental liberties." *Lopez*, 514 U.S. at 552 (*quoting Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)); *Lopez*, 514 U.S at 576 (Kennedy, J., concurring) ("it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one"). Morrison has a right to be free from an overreaching Congress, just as he has the right to be free from a Congress that would pass a law abridging freedom of speech. Thus, petitioners err in believing that the number of states who do or do not support a federal tort remedy is of any consequence. Even if all of them supported it, they cannot defeat this constitutional protection of individual liberty.

In *Lopez*, this Court reaffirmed the proposition that an "enumeration presupposes something not enumerated." *Lopez*, 514 U.S. at 566 (*quoting Gibbons v. Ogden*, 22 U.S. 1, 195 (1824)). Concerned that expansive interpretations of Congressional powers would leave nothing "unenumerated," and lead to an arrogation of power threatening individual liberty, this Court recently confirmed the limits to two of those powers -- the Commerce Clause and Section 5 of the Fourteenth Amendment -- in *Lopez* and *City of Boerne*. Petitioners have relied on only those two powers, and the Fourth Circuit properly concluded that those cases controlled here. In fact, when compared to *Lopez* and *City of Boerne*, this is an *a fortiori* case.

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[3](...continued)
392, 394 (7th Cir. 1996) (court "has the power [and] . . . the obligation to take judicial notice of the relevant decisions of courts . . . , whether made before or after the decision under review").

With respect to the Commerce Clause power in Article I, § 8, one could at least argue, as Justice Breyer's dissent in *Lopez* did, that schools have a special relationship to interstate commerce given their own commercial dealings and their role in the economic development of their charges. One could at least argue, as Justice Stevens's dissent did, that guns are a commodity whose possession must be regulated to control their trade in interstate commerce.

Subtitle C regulates violence. Petitioners' theory is that any human behavior that, when aggregated across the population, could affect our collective capacity to consume, produce, or move in interstate commerce is within Congress's power to regulate. As both courts below recognized, that includes anything that affects our physical, mental, or emotional health because our health certainly affects our ability to work, buy, and travel. It includes all crime. It includes all activities which inflict injuries unintentionally. As the lower courts found, it also includes insomnia, obesity, and a lack of exercise. Pet. App. 38a, 380a-81a.

To avoid these obvious consequences, petitioners identify various criteria which they claim *might* limit Congress's Commerce Clause power. Perhaps, they assert, Congress cannot reach everything if it has not made findings, or if the states are doing a good job, or if the statute displaces state policies, or if it is not a "civil rights" law. These "limits" are not only bereft of any precedent to support them, but actually contradict well-established authority. Just as important, all of these limits have one thing in common: none of them has anything to do with "commerce." None relate to whether Congress is regulating "[c]ommerce with foreign nations, among the states, and with the Indian tribes." Under these theories, it is not the *enumeration* which presupposes something not enumerated; it is other, extra-constitutional things.

In the end, petitioners do not ask this Court to apply *Lopez*, but to ignore it. Pet. App. 76a, 81a-82a.[4]

With respect to Section 5, the Religious Freedom Restoration Act ("RFRA") at issue in *City of Boerne* at least sought to regulate those purportedly violating Section 1 of the Fourteenth Amendment: state governments. Here, petitioners argue that, although it is the states who have been violating the prohibitions of Section 1, Congress can "enforce" those prohibitions by letting those violators off the hook and punishing private parties whose conduct could not possibly violate Section 1. This Court has never sanctioned any such theory under Section 5. In fact, as the Fourth Circuit recognized, this Court rejected it long ago, and with good reason. If Congress could replace state law anytime it was dissatisfied with the way in which States were, for example, protecting "property" and "liberty" from private invasions, its Section 5 powers would be limited only by its "underdeveloped capacity for self-restraint." *Garcia v. San Antonio Metropolitan Transit Ass'n*, 469 U.S. 528, 588 (1985) (O'Connor, J., dissenting).

Petitioners' positions require this Court to reject both venerable and recent precedents, and to embrace explicitly a constitutional theory that places no meaningful limit on Congressional power.

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[4] *See also, e.g.*, Plaintiff's Memorandum In Opposition To Defendants' Motion To Dismiss Filed 3/15/96 (J.A. 6) 12 (noting that the "true significance" of *Lopez* was the Court's "surprising unwillingness . . . to apply 'rational basis' analysis," whereby courts "hypothesize situations whereby the stream of interstate commerce may be affected in any conceivable way"; and urging the court to apply such "rational basis analysis" anyway).

ARGUMENT

I. THE COMMERCE CLAUSE DOES NOT AUTHORIZE CONGRESS TO REGULATE GENDER-BASED ANIMUS-MOTIVATED FELONIES

Congress cannot regulate felonious conduct pursuant to its power to regulate "commerce . . . among the states" because the activity being regulated is wholly non-economic in nature and because recognition of such a power would authorize Congress to regulate virtually anything.

In *Lopez*, the Court identified three categories of Commerce Clause legislation: laws regulating the channels of interstate commerce, laws regulating the instrumentalities of interstate commerce, and laws regulating activities which substantially affect interstate commerce. *Lopez*, 514 U.S. at 558-59. As in *Lopez*, the first two categories are "quickly disposed of" (*id.* at 559). Subtitle C does not regulate the "channels" or "instrumentalities" of interstate commerce, and, as in the court below, petitioners do not suggest otherwise. Pet. App. 16a-17a n.4. Subtitle C, then, can be sustained only if it regulates activity that "substantially affects" interstate commerce.

As the lower court noted, the phrase "substantially affects" (as interpreted in *Lopez*) is a term of legal art. Pet. App. 17a, 197a (Niemeyer, J., concurring). Mere quantitative effects on interstate commerce -- *i.e.*, any possible change in the volume of interstate commerce -- are insufficient since virtually any human activity can have such effects. Pet. App. 48a. *See also Lopez*, 514 U.S. at 558-59 ("Congress' commerce authority includes the power to regulate those activities having a substantial *relation* to interstate commerce" (emphasis added)); *United States v. Bird*, 124 F.3d 667, 677 n.11 (5th Cir. 1997) ("in determining whether the regulated intrastate activity substantially affects interstate commerce, 'substantial' must be understood to have reference not only to a quantitative measure but also to qualitative ones"); Deborah Jones Merritt, *Commerce!*, 94 Mich. L. Rev. 674, 679 (1995) (Court in *Lopez* rejected simple quantitative measure of "substantial" effects; "[t]he majority's use of 'substantial effect' is more akin to the notion of proximate cause in tort law"). In *Lopez*, this Court held that the qualitative connection to commerce is considered in light of the nature of the activity regulated.

A. Subtitle C Does Not Regulate Activity That "Substantially Affects" Interstate Commerce

In determining that possession of guns near schools did not "substantially affect" interstate commerce, this Court laid great weight on the non-economic nature of the activity being regulated. *Lopez*, 514 U.S. at 559-60 ("[W]e have upheld a wide variety of congressional Acts regulating intrastate *economic* activity where we have concluded that the activity substantially affected interstate commerce . . . Where *economic activity* substantially affects interstate commerce, legislation regulating that activity will be sustained. Even *Wickard* [*v. Filburn*, 317 U.S. 111 (1942)], which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved *economic activity* in a way that the possession of a gun in a school zone does not" (emphasis added)); *id.* at 561 (GFSZA "is not an essential part of a larger regulation of economic activity . . . It cannot be sustained, *therefore*, under our cases upholding regulations of activities that arise out of or are connected with a *commercial transaction*, which viewed in the aggregate, substantially affects interstate commerce" (emphasis added)); *id.* at 567 ("The possession of a gun in a local school zone is in no sense an *economic activity* that might, through repetition elsewhere,

substantially affect any sort of interstate commerce" (emphasis added)).

The dissenters in *Lopez* understood the "*critical* distinction between 'commercial' and noncommercial 'transaction[s].'" *Lopez*, 514 U.S. at 627 (Breyer, J., dissenting (emphasis added)). So have most commentators. *E.g.*, 1 Lawrence H. Tribe, *Constitutional Law*, § 5-4 at 819 (3d ed. 1999) ("rather than focusing on the quantity of the regulated activity's effects, the Court was attempting to reconfigure its precedents to focus more attention on the *nature of the underlying activity* -- paying particular attention to whether or not that activity could itself be described as part of an economic enterprise" (emphasis in original)). The court below amassed numerous quotes from the majority decision, concurrences, and dissents in *Lopez*, all demonstrating this Court's focus on this key factor (Pet. App. 18a-22a). *See also* Pet. App. 83a, 198a-99a (Niemeyer, J. concurring). The court below assumed that no reasonable reader could then gainsay the importance of that factor.

Plainly, it underestimated petitioners. Continuing the pattern they have followed throughout this litigation,[5]

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[5] *See* Pet. App. 80a-82a. Indeed, in this Court, when challenged to explain what significance the non-economic nature of the conduct had in *Lopez*, Brzonkala responded that there was no reason "why petitioners should have provided any such explanation" because *Lopez* just "restate[d] the traditional test." Brzonkala Certiorari Petition Reply Brief 8.

Among all the briefs submitted by petitioners and their amici, only one even mentions this Court's reliance in *Lopez* on the non-economic nature of the conduct being regulated -- and that brief inexplicably refers to the opinion of this Court as the "plurality opinion." Brief Of Amici NYC Bar Ass'n, *et al.*, 10-11.

petitioners give no weight at all to the nature of the underlying activity. *E.g.*, Brzonk. Br. 39 ("has never been the test"). The closest they come is the United States' masterful understatement that the *Lopez* Court "*observed* that the GFSZA neither regulated a commercial activity nor contained a jurisdictional element." U.S. Br. 30 (emphasis added). (Subtitle C also lacks a jurisdictional element.) The United States quickly then asserts that those features were "not dispositive" because the *Lopez* Court quoted *Wickard v. Filburn*, 317 U.S. 111 (1942) -- in the section of the opinion in which this Court simply reviewed its past precedents. The United States ignores this Court's distinction of *Wickard*: that it involved "economic activity" in a way that the possession of guns around schools does not.

Subtitle C regulates non-economic violent activity. Indeed, it is hard to envision an activity more non-economic than the violence regulated by the Act. Not only is such violence generally non-economic, but the Act only covers such violence when a significant motivation is gender animus, a non-commercial motive.

Nonetheless, the United States tries several tacks to avoid this conclusion. First, it asserts that the felonies regulated by Subtitle C have an "economic component" because they *might* take place at work or at a store or at a bus terminal. U.S. Br. 18, 32. But any activity *might* occur at a place where commerce is transacted; that hardly means that it is "economic activity." The possession of a gun near a school *might* be for the purpose of selling it -- as was true in *Lopez*. *United States v. Lopez*, 2 F.3d 1342, 1345 (5th Cir. 1993) (Lopez intended to sell his gun for $40 for use in a gang war), *aff'd*, 514 U.S. 549 (1995).

The United States also argues that Subtitle C is designed to remedy inadequate state mechanisms for com-

pensating victims, and those mechanisms are "economic activity." U.S. Br. 18, 32. This is an evident bootstrap argument. An activity is not economic because it might result in a lawsuit for monetary compensation. Here, Subtitle C regulates violence, not the "activity" of providing a cause of action. The United States' argument would give Congress the authority to "regulate" all of domestic relations law (by setting up its own) if it were dissatisfied with the manner in which states distribute marital property.

For her part, Brzonkala assails the Fourth Circuit for creating a "bright line" test. In one of her few references to the majority opinion in *Lopez*, she notes that this Court stated that the distinction between economic and non-economic activity cannot be a "precise formulation." Brief of Petitioner Christy Brzonkala ("Brzonk. Br.") 38 (*quoting Lopez*, 514 U.S. at 567). But the Fourth Circuit never said there was a "bright line" or a "precise formulation." It simply held that the activity regulated here falls on the non-economic side of the line. There may be hard cases. This is just not one of them. And it is a virtue of the Fourth Circuit's opinion, not a flaw, that it reads *Lopez* to limit the scope of Congressional authority in an articulable way.

In any event, the Fourth Circuit also held that even if the non-economic nature of the activity were only a presumptive disqualification, Subtitle C is still unconstitutional. Pet. App. 31a-51a. The District Court considered a whole array of factors from *Lopez*; it did not view *any* of them as dispositive, and yet arrived at the same conclusion. Pet. App. 365a-382a.

Brzonkala now asserts that the Fourth Circuit's "facial invalidation" of Subtitle C was improper because "paying substantial fees for a college education is an economic activity" and Brzonkala "was forced to withdraw

from college" as a "direct result" of defendants' alleged conduct. Brzonk. Br. 41-42. This is an argument that Brzonkala did not make in the court below. She also ignores that this Court invalidated the GFSZA on its face. Further, it is not clear how Brzonkala defines "direct result." The amended complaint alleges that she withdrew eleven months after the assault and only because Virginia Tech had concluded that Morrison did not assault her. J.A. 26-27 (¶¶ 70-76); Brzonk. Br. 6. (Apparently, Virginia Tech's earlier conclusion that Crawford had not assaulted her (J.A. 22 (Am. Com. ¶ 52)) was insufficient to warrant withdrawal.) The connection she cites between the alleged attack and the failure of an intrastate commercial transaction nearly one year later is far weaker than the connection between the possession of a gun at issue in *Lopez* and an *immediate* commercial transaction -- its sale for $40.

Brzonkala would have this Court append a jurisdictional requirement of some kind onto Subtitle C, but which one? The narrow "in commerce" requirement of the Clayton Act (*see Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186 (1974)) or something else? This Court was unwilling to rewrite the statute in *Lopez*, and it should not do so here. Congress considered the matter and evidently wanted a statute just this broad.

The characterization of gender-based, animus-motivated felonies as non-economic activity is confirmed by the tenuous connection these acts have to "commerce . . . among the states." In order to go from the very serious harm to an individual to a substantial effect on interstate commerce, the need for inferences is no different from *Lopez*. For example, petitioners refer to testimony concerning Polaroid to establish such a connection. U.S. Br 24 n.8; Brzonk. Br. 11. A Polaroid executive did describe a program at Polaroid for battered women, but did not

identify whether those women would have been covered by Subtitle C. *Hearing On Domestic Violence: Hearing Before The Senate Judiciary Committee*, 103rd Cong. 15-16 (1993) (Statement of James Hardeman). Of course, Subtitle C is not limited to women who work, but covers all people. But even if it were so limited, simply assuming that, because women work at Polaroid and Polaroid ships products in interstate commerce, every aspect of those women's well-being "substantially affects" interstate commerce is no different from assuming that violence at schools affects how much interstate commerce those schools can engage in. Each assumption requires inferences that *Lopez* rejected.

These inferences can be compared with those required in *Wickard v. Filburn*, 317 U.S. 111 (1942), which the *Lopez* Court called "perhaps the *most far reaching example* of Commerce Clause authority over intrastate activity." *Lopez*, 514 U.S. at 560 (emphasis added). In *Wickard*, the Court held that "[t]he effect of consumption of homegrown wheat on interstate commerce is due to the fact that it constitutes the most variable factor in the disappearance of the wheat crop. Consumption on the farm where grown appears to vary in an amount *greater than 20 per cent* of average production." *Wickard*, 317 U.S. at 127 (emphasis added). It hardly required a massive leap of faith for the Court to conclude that so high a proportion of wheat would affect the price of wheat shipped in interstate commerce. If *Wickard* reflects "the most far reaching example" of permissible Commerce Clause authority, Section 13981 goes well beyond that authority.

B. Petitioners' Cases Are Distinguishable

Petitioners rely on a series of pre-*Lopez* cases. These cases are distinguishable for precisely the same reasons they were distinguished in *Lopez*.

Petitioners claim that *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) and *Katzenbach v. McClung*, 379 U.S. 294 (1964) stand for the proposition that Congress is within its Commerce Clause powers whenever it tries to removes barriers to participation in the economy, and that Subtitle C is such an effort. U.S. Br. 23-28; Brzonk. Br. 23-26. But those cases did not authorize Congress to remove any and all "barriers" to shopping, work, and travel. Rather, and contrary to the assertions of the United States (U.S. Br. 27 n.15), this Court relied significantly on the fact that the statute in question reached only businesses (certain hotels and restaurants) with close ties to interstate commerce. *Heart of Atlanta Motel*, 379 U.S. at 250 ("Title II [of the Civil Rights Act of 1964] is carefully limited to enterprises having a direct and substantial relation to the interstate flow of goods and people"); *Katzenbach v. McClung*, 379 U.S. at 302 (the Commerce Clause "power extends to activities of *retail establishments* . . . which directly or indirectly burden or obstruct interstate commerce" (emphasis added)); *id.* at 304 ("Congress prohibited discrimination only in those establishments having a close tie to interstate commerce, *i.e.*, those . . . serving food that has come from out of the State"). So limited, the activities being regulated had a close, proximate connection to interstate commerce. *E.g.*, *Heart of Atlanta Motel*, 379 U.S. at 253 ("testimony indicated a *qualitative as well as quantitative effect* on interstate travel by Negroes. The former was the obvious impairment of the Negro traveler's pleasure and convenience that resulted when he continually was uncertain of finding lodging" (emphasis added)).[6]

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[6] The United States asserts that this Court was unconcerned with whether the statute was limited to restaurants with a specific interstate connection. U.S. Br. 27 n.15 (*quoting McClung*, 379 U.S. at 304-

(continued...)

Petitioners' "barrier" argument also does not distinguish *Lopez*. As the District Court noted (Pet. App. 375a), *Lopez* rejected an argument that violence around schools precludes schoolchildren from full participation in the economy. *See* Brief for United States, *United States v. Lopez*, 514 U.S. 549 (1995), 1994 WL 242541, 22 ("Congress had ample basis as well to conclude that such impediments [caused by school violence] to the educational process would have substantial deleterious effects on the functioning of the national economy" because students were graduating from school without the skills to be productive workers in a global economy). More importantly, *Lopez* distinguished *Heart of Atlanta Motel* and *McClung* -- not because guns in schools did not create "barriers" but because, unlike the activity regulated by Title II of the Civil Rights Act of 1964, the activity regulated by the GFSZA was not economic in nature. *Lopez*, 514 U.S. at 559 (*McClung* and *Heart of Atlanta Motel* were cases involving laws that regulated, respectively, "restaurants utilizing substantial interstate supplies," and "inns and hotels catering to interstate guests"); *see also id.* at 573 (Kennedy, J., concurring) (*Heart of Atlanta Motel* and *McClung* were "examples of the exercise of federal power where *commercial transactions were the subject of regulation*" (emphasis added)).

Nor does petitioners' argument distinguish much else. All violent crime creates a barrier to participation in the economy. Murder victims, to cite an obvious example, are precluded from participating in the economy. All sorts of health problems create barriers for those who suffer from

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[6](...continued)
05). The portion of the case they quote, though, only demonstrates that the Court was not particularly concerned with whether the *regulation* would substantially affect interstate commerce; it was sufficient that the regulated activity (restaurants with interstate connections) did.

them.[7] To avoid this obvious consequence, Brzonkala suggests that Congress can regulate only "discriminatory activity" that creates a barrier to participation in interstate commerce. Brzonk. Br. 25. But this limit makes no sense. The more common non-discriminatory violence against women creates a more widespread "barrier" than gender-based, animus-motivated violence.

Petitioners also cite cases like *United States v. Wrightwood Dairy Co.*, 315 U.S. 110 (1942) and *United States v. Women's Sportswear Mfg. Ass'n*, 336 U.S. 460 (1949) to support the proposition that the nature of the underlying activity is irrelevant. Brzonk. Br. 26-27; U.S. Br. 31. But both of those cases dealt with intrastate commercial activity (sale of milk in *Wrightwood*, the production of women's sportswear for interstate sale in *Women's Sportswear*). The Court's language in those cases cannot be applied to a question -- whether Congress can regulate activity wholly non-economic in nature -- that was not before it.

C. "Findings" Do Not Distinguish Lopez

Petitioners also rely heavily on the fact that Congress made findings concluding that the "gender-based" violence substantially affects interstate commerce. This reliance misconstrues *Lopez*.

1. The Findings. -- At the outset, the "findings" themselves are extraordinarily weak support. This is reflected in petitioners' briefs, in which they repeatedly

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[7] *E.g.*, National Institutes of Health, *Statistics Related To Overweight And Obesity*, NIH Publication No. 96-4158 (July 1996), *available at* www.niddk.nih.gov/health/nutrit/pubs/statobes.htm (300,000 preventable deaths per year caused by poor diet and inactivity).

refer to statistics identifying the "costs" to the "economy" of *all* domestic violence or *all* violence against women, activity largely uncovered by Subtitle C. U.S. Br. 6-7, 24-26; Brzonk. Br. 10-13.[8] Of course, gender-based animus-motivated violence against women is a subset of all violence against women (and all violence of any kind). Once more petitioners suggest an argument which, if it proves anything, proves too much.

The only "findings" concerning *gender-based, animus-motivated* violence are in the final Conference Report, findings so broad and conclusory that they state little more than what would be obvious about violence as a whole. U.S. Br. 5; H.R. Conf. Rep. No. 103-711 at 385. *See Lopez*, 514 U.S. at 612 n.2 (Souter, J., dissenting) (GFSZA findings are expressed "at such a conclusory level of generality as to add virtually nothing to the record").

2. The "Absence" Of "Findings" In Lopez. -- As both courts below emphasized (Pet. App. 63a, 371a-73a), this Court *had* findings before it in *Lopez*.[9] Although the

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[8] Brzonkala misstates the record by referring to Congress's "findings" concerning "gender-motivated" violence where the actual report refers only to all domestic violence or all violence against women. Brzonk. Br. 11-12 (citing S. Rep. No. 101-545 for purported propositions that "*gender-motivated* violence causes 'lost careers . . . '" and "*gender-motivated* violence can force victims into poverty" (emphasis added)).

[9] In Section 320904 of Public Law 103-322, Congress amended the GFSZA to set forth findings that crime is a nationwide problem which is exacerbated by the interstate movement of drugs, guns, and criminal gangs; firearms and their component parts move easily in interstate commerce and guns have been found in increasing numbers around schools; citizens fear to travel through certain parts of the country due

(continued...)

government did not rely on them, this Court was aware of them. *Lopez*, 514 U.S. at 563 n.4. The suggestion that the constitutional flaw in the GFSZA already had been remedied, but that this Court simply chose not to mention that fact, is a remarkable and inappropriate attribution to this Court. Moreover, it is inconsistent with the government's own position after *Lopez* was decided. The Justice Department did not consider the previous findings sufficient or suggest additional findings; rather, it proposed adding a jurisdictional element. 31 Weekly Comp. Pres. Doc. 809 (May 10, 1995) ("The legislative proposal [recommended by Attorney General Reno after *Lopez*] would amend the Gun-Free School Zones Act by adding the requirement that . . . the firearm has 'moved in or the possession of such firearm otherwise affects interstate or foreign commerce'").

Further, this Court specifically stated that, although findings might be helpful, they were not required. *Lopez*, 514 U.S. at 562. Nor is any legislative record required. *Maryland v. Wirtz*, 392 U.S. 183, 190 n.13 (1968) ("We are not concerned with the manner in which Congress reached its factual conclusions"), *overruled on other grounds*, *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled*, *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). *Compare* U.S. Br. 29 n.15. Indeed, the analysis of the Fair Labor Standards Act ("FLSA") in *Wirtz* entirely undermines petitioners' reliance on findings. *Wirtz* regulated activity related to (*inter alia*) schools, just as in *Lopez*, and this Court

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[9](...continued)
to concern about violent crime and gun violence; the occurrence of violent crime in school zones has resulted in a decline in the quality of education, which in turn has had an adverse impact on interstate commerce; and States are unable to handle gun-related crime on their own. 18 U.S.C. § 922(q)(1).

recognized that schools "obviously purchase a vast range of out-of-state commodities." *Wirtz*, 393 U.S. at 201. There were no findings, just as petitioners claim there were none in *Lopez*. The FLSA amendment in *Wirtz* was constitutional, and the GFSZA was not, because the former regulated the payment of wages to individuals employed by enterprises engaged in commerce (*Wirtz*, 393 U.S. at 186-93) and the latter regulated the possession of guns. It was the nature of the regulated activity that made the difference in outcomes.

Finally, this Court in *Lopez* considered the government's arguments (as well as those of the dissent) on tne merits. It did not reject them because Congress had not adopted them, but rather because they would lead to the conclusion that Congress's power is unlimited. Petitioners' arguments here bear a striking resemblance to the arguments made by the government in *Lopez*. *Compare* U.S. Br. 5 (crimes of violence motivated by gender "have a substantial adverse effect on interstate commerce by deterring potential victims from traveling interstate") *with Lopez*, 514 U.S. at 564 ("violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe"). *Compare* Brzonk. Br. 12-13, 20, 29 (discussing effects of violence on college campuses on women's educational opportunities and employment prospects) *with Lopez*, 514 U.S. at 564 (government argues that guns around schools threatens the learning environment for students and leads to a less productive citizenry).

3. "Findings" Provide No Substantive Limit. -- Requiring Congress to make findings provides no substantive limit to its power, just a procedural one. At some level of for-want-of-a-nail-the-kingdom-was-lost causation, everything can be connected to interstate commerce. *Lopez*, 514 U.S. at 580 (Kennedy, J. concurring) (Con-

gressional power must be limited even though "[i]n a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence"); *Northern Securities Co. v. United States*, 193 U.S. 197, 402 (1904) (Holmes, J. dissenting) ("Commerce depends upon population, but Congress could not, on that ground, undertake to regulate marriage and divorce"). See also Tribe, *Constitutional Law*, § 5-4 at 818 n.47 ("A resourceful legislator (or legislative assistant) could likely compile an impressive array of materials connecting just about any activity to the national economy"). If *Lopez* means only that Congress can regulate non-economic conduct if it says it is regulating interstate commerce, it means very little. *Cf. Seminole Tribe v. Florida*, 517 U.S. 44, 64 (1996) ("'If *Hans* [*v. Louisiana*, 134 U.S. 1 (1890)] means only that federal question suits for money damages against the States cannot be brought in federal court unless Congress clearly says so, it means nothing at all'" *quoting Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 36 (1989) (Scalia, J., dissenting), *overruled*, *Seminole Tribe v. Florida*, 517 U.S. 44 (1996)).

This Court owes Congress deference in any statute it passes, be it Congress's determinations that something constitutes an "important" or "compelling" governmental interest or its determinations that something is "commerce among the states," but "whatever deference is due legislative findings would not foreclose [this Court's] independent judgment of the facts bearing on an issue of constitutional law." *Sable Communications, Inc. v. F.C.C.*, 492 U.S. 115, 129 (1989). Surely the Court's recent cases rejecting Congress's efforts to legislate under Section 5, like *City of Boerne* and *Florida Prepaid Postsecondary Education Expense Bd. v. College Savings Bank*, 119 S. Ct. 2199 (1999), demonstrate this. In each instance, Congress made explicit findings, based upon a legislative record, that States were violating Section 1 and that legislation to enforce

Section 1 was needed. In each instance, this Court reviewed those findings and found them wanting. Unless there is some sliding scale of enumerated powers -- and petitioners offer no reason why there should be -- deference must have limits under the Commerce Clause as well.

Thus, petitioners' emphasis on deference to Congressional findings (*e.g.*, Brzonk. Br. 27; U.S. Br. 22) misses the point. The issue is not whether Congress rationally found that gender-based animus-motivated violence "substantially affects" interstate commerce as *it* understands the phrase "substantially affects." Rather, the issue is whether it properly found that the activity "substantially affects" interstate commerce as *this Court* used it in interpreting the Constitution in *Lopez*. Since, as shown above, Congress's findings cannot meet the standard set by this Court's interpretation of "substantially affects" in *Lopez*, they cannot be sufficient to render the statute constitutional.

If it is to remain true that "the enumeration presupposes something not enumerated," findings cannot make the difference. If they do then what has been recognized as a fundamental constitutional limit on Congress's power from the time of Chief Justice Marshall to today would have been reduced to a formality, easily satisfied by Congressional staffs and special interest groups eager to provide whatever testimony is necessary to construct such a Congressional record. On the other hand, if this Court must determine for itself whether the criteria set out in *Lopez* have been respected, then the integrity of the constitutional scheme is preserved, without sacrificing powers that have been found necessary to address economic problems of national scope.

D. Petitioners' Other Distinctions Are Meritless

Petitioners try other ways to distinguish *Lopez*,

mostly through a series of federalism-related arguments. These arguments are wrong in many different ways. First, the "distinctions" have nothing to do with "commerce among the states." Second, the facts here are not distinct from *Lopez* in any meaningful way. Third, the "distinctions" petitioners offer have no basis in law.

1. Congress's "Finding" That The States Have Been Ineffective. -- Petitioners emphasize that Congress found that the States were doing an inadequate job in responding to gender-based animus-motivated violence. Brzonk. Br. 29-31; U.S. Br. 35. Between the two of them, they cite only one case, *Perez v. United States*, 402 U.S. 146 (1971) (Brzonk. Br. 29), to support the proposition that Congress's commerce power expands when it makes such a finding or contracts when it does not.[10] But Brzonkala's suggestion that certain floor remarks of one Senator quoted by this Court in *Perez* played some role in this Court's decision to uphold the statute is unsupported by anything in the opinion. *Perez*, 402 U.S. at 155-57.

This argument also fails for one of the same reasons the general "legislative findings" argument fails. There was such a "finding" before this Court in *Lopez*. *See* n.9, *supra*. Again, petitioners are reduced to arguing that this Court simply ignored an important finding that, in petitioners' view, had remedied the flaw in the statute.

2. "Displacement" Of State Law. -- Remarkably,

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[10] Neither petitioner explains how this proposition can be reconciled with the numerous authorities stating that the commerce power is plenary when it is regulating private conduct and acting properly within that power. *E.g.*, *Southland Corp. v. Keating*, 465 U.S. 1, 11 (1984) ("At least since 1824 Congress' authority under the Commerce Clause has been held plenary").

after arguing that "impediments like state interspousal immunities and evidentiary rules" (Brzonk. Br. 30) required federal intervention, Brzonkala then argues at length that Subtitle C should be upheld because it does not displace any of those state impediments. Brzonk. Br. 32-35. *See also* U.S. Br. 35. Not only is petitioners' argument here internally inconsistent and unsupported by any case law, it is fundamentally inconsistent with the basic constitutional scheme. *If* Congress is acting within its enumerated powers, it has the ability to displace (*i.e.*, preempt) whatever it chooses.[11] Petitioners' argument is that this Court should assess whether something is within Congress's enumerated powers by asking how much state law it has displaced. It turns constitutional law on its head.[12]

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[11] *See, e.g., City of New York v. F.C.C.*, 486 U.S. 57, 63 (1988) ("When the Federal Government acts within the authority it possesses under the Constitution, it is empowered to pre-empt state laws to the extent it is believed that such action is necessary to achieve its purposes. The Supremacy Clause of the Constitution gives force to federal action of this kind . . . "); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) ("[W]hen Congress has 'unmistakably . . . ordained' . . . that its enactments alone are to regulate a part of commerce, state laws regulating that aspect of commerce must fall").

[12] Petitioners seem to believe that Justice Kennedy's concurrence in *Lopez* supports this startling theory. Brzonk. Br. 32-34; U.S. Br. 31. In fact, the Kennedy concurrence merely points out that the threat to individual liberty is at its apex when Congress regulates in areas of traditional state activity because lines of political accountability are confused. *Lopez*, 514 U.S. at 576-77 (Kennedy, J., concurring). That insight simply suggests that this Court's concern over cabining Congress's authority within constitutional limits should be heightened when Congress regulates in an area of traditional state authority, not that it should abandon an unbroken line of precedent permitting Congress to both legislate and preempt whenever it is properly within one of its enumerated powers.

Further, petitioners misstate the facts of *Lopez* when they assert that the GFSZA "*prohibited* the states from carrying out their own solutions . . . regulating firearms and education" (Brzonk. Br. 33 (emphasis added)) and suggest that it somehow precluded states from prosecuting violations of their own law (U.S. Br. 33). In fact, as the court below noted (Pet. App. 42a n.10), the GFSZA did not preempt any state law, permitted states to establish their own gun-free zones, and exempted guns licensed by states or localities. Petitioners *repeatedly* insist that Subtitle C "supplements, but does not supplant" state law (U.S. Br. 18, 33; Brzonk. Br. 20-21, 38), but the same thing could have been said about the GFSZA. In fact, it was. Brief for United States, *United States v. Lopez*, 514 U.S. 549 (1995), 1994 WL 242541, *29 (GFSZA "supplements rather than supplants" state efforts).

Indeed, as the Fourth Circuit found, in the modest way that the GFSZA did "supplant" state prerogative -- individuals in states that had no rule concerning possession of guns around schools might be subject to criminal liability (if their guns were not state-licensed) -- Subtitle C does even more. Pet. App. 44a.

3. Traditional State Areas Of Regulation. -- If, as petitioners suggest, Congress were precluded from displacing state policy in traditional areas of state regulation, that would only further demonstrate the unconstitutionality of the civil remedy. Subtitle C provides remedies for intentional torts, a traditional area of state regulation. *E.g., Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984) (recognizing "the States' traditional authority to provide tort remedies to their citizens"); *Head v. New Mexico Bd. Of Examiners In Optometry*, 374 U.S. 424, 443 (1963) (Brennan, J., concurring) (noting concession by Solicitor General that Congressional regulation in

Communications Act of 1934 "intended the survival of certain 'traditional' state powers and remedies -- particularly common-law tort and traditional criminal sanctions").

To evade this conclusion, petitioners insist that Subtitle C is civil rights legislation. U.S. Br. 34. As the Fourth Circuit noted, though, the Constitution provides no special dispensation for laws labelled "civil rights" laws. Pet. App. 70a-76a.

4. The Necessary And Proper Clause. -- Brzonkala tries to distinguish *Lopez*, and provide some textual support for her other arguments, by relying on the Necessary and Proper Clause, "the last, best hope of those who defend *ultra vires* congressional action." *Printz v. United States*, 521 U.S. 898, 923 (1997). *See* Brzonk. Br. 36-38. *See also* U.S. Br. 21-22 n.7. She claims that the GFSZA was not "necessary because national legislation was not *needed* to protect interstate commerce and because state law and programs were already addressing the problem." Brzonk. Br. 36 n.14 (emphasis added). Further, it was not "proper" because it intruded on state sovereignty and foreclosed future efforts by the States to address the problem. *Id.*

This is an unusual reinterpretation of the Necessary and Proper Clause (as well as *Lopez*). That clause always has been understood to provide what was implicit in the Constitution itself: to permit any legislation appropriate to reach a constitutional end. *M'Culloch v. Maryland*, 17 U.S. 316, 413-20 (1819) (rejecting contention that a law must be "necessary" in a strict sense). The suggestion that this Court should review Congressional legislation for "need" would invite far more judicial activism than anything remotely suggested by the court below. *See* Pet. App. 168a-189a (Wilkinson, C.J., concurring) (discussing judicial activism generally).

Brzonkala correctly asserts that the Necessary and Proper Clause simply permits Congress to reach intrastate commerce that "substantially affects" interstate commerce. Brzonk. Br. 36. The reasons why the GFSZA was not "necessary and proper," then, are the same reasons why it did not "substantially affect" interstate commerce.[13]

E. Petitioners' Rationale Would Lead To A General Police Power For Congress Inconsistent With The Doctrine Of Enumerated Powers

Petitioners' arguments would give Congress the power to pass virtually any legislation at all because all human activity has economic consequences of one kind or another. *That* was the "federalism" concern that animated the Court in *Lopez*, not the concerns petitioners emphasize. *Lopez*, 514 U.S. at 564 ("We pause to consider the implications of the Government's arguments . . . [I]f we were to accept the Government's arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate"); *id.* ("Justice Breyer . . . is unable to identify any activity that the States may regulate but Congress may not"); *id.* at 565 ("Justice Breyer's rationale lacks any real limits because, depending on the level of generali-

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[13] In *M'Culloch*, this Court did note that a law might not be "necessary and proper" if it were a pretext for the regulation of something outside the enumerated powers. *M'Culloch*, 17 U.S. at 423. Although this Court has not generally considered Congress's motive, it can hardly be disputed that the real purpose of VAWA was not to address a problem in interstate commerce, but to do something about violence against women, *see, e.g.*, U.S. Br. 3, and Subtitle C's primary purpose was to send a "signal." *See also 1998 Senate Hate Crimes Hearings* 16 (Holder Statement) (criminal provisions of VAWA (18 U.S.C. §§ 2261, 2262) were inadequate because they *did not* have a "gender motivation" requirement and prosecutions under them were thus unable to attach a "stigma."

ty, any activity can be looked upon as commercial"); *id.* at 566 (enumerated powers should be "interpreted as having judicially enforceable outer limits"); *id.* at 580 (Kennedy, J., concurring) (there must be "meaningful limits on the commerce power").

As the lower courts have demonstrated, any human activity, and certainly all crime, can be connected to "the national economy" in the same way that gender-based, animus-motivated crime can. Petitioners do not identify any activity that cannot. Brzonkala does claim, though, that her "four factors derived from the Court's Commerce Clause cases, and the Necessary and Proper Clause provide principled, practical limitations on Congress's power." Brzonk. Br. 39. (The "four factors" are Congress's power to remove barriers to participation in the economy, Congressional findings, Congressional findings of State inadequacy, and an absence of intrusion on State sovereignty.) But this is nonsense. The first "factor" plainly does not limit anything (even if Brzonkala contends that "removing barriers" is the *only* thing Congress can do). "Findings" do not provide a *substantive* limit of any kind, and have never been required by this Court. Brzonkala's last "factor," and the Necessary and Proper Clause, provide limits only by an extraordinary reinterpretation of this Court's jurisprudence.

Ultimately, petitioners' argument amounts to the proposition that Congress should be able to regulate any problem it deems sufficiently important. Brzonkala's citation to the Sixth Virginia Resolution submitted to the Committee on Detail makes this clear. Brzonk. Br. 30. That resolution *might have* given Congress the power that Brzonkala would now give it. But it was not adopted and was never sent to the states. Tribe, *Constitutional Law*, § 5-2 at 795; Grant S. Nelson and Robert J. Pushaw, *Rethinking The Commerce Clause: Applying First Principles*

To Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues, 85 Iowa L. Rev. 1, 25-26 n.104, 96 (1999). Petitioners want this Court to reverse that decision of the Convention and the nation. *See also Kansas v. Colorado*, 206 U.S. 46, 89 (1907) ("the proposition that there are legislative powers affecting the nation as a whole which belong to [Congress], although not expressed in the grant of powers, is in direct conflict with the doctrine of enumerated powers"); *id.* at 92 ("it may well be that no power is adequate for [the reclamation of arid lands] other than that of the national government. But, if no such power has been granted, none can be exercised").

As this Court noted, Congress will never be powerless. *Id.* (noting that many arid lands were in the territories over which Congress had plenary control). VAWA's many other provisions, not at issue here, demonstrate that. But the fact that Congress has some power to address every problem does not mean that it may do so in any way it chooses. The Constitution still says otherwise.

II. SECTION 5 DOES NOT AUTHORIZE CONGRESS TO REGULATE FELONIES COMMITTED BY PRIVATE INDIVIDUALS

Subtitle C regulates felonious conduct regardless of whether the perpetrators act under color of state authority. To the extent it reaches private conduct like that at issue in this case, Section 5 of the Fourteenth Amendment does not authorize it.

A. The Plain Meaning Of Section 5 Demonstrates That Section 13981 Does Not "Enforce" The Prohibition In Section 1 Against Denials Of Equal Protection

In assessing the scope of Section 5, this Court "be-

gin[s] with its text." *City of Boerne*, 521 U.S. at 519. Section 5 grants Congress the power to "enforce by appropriate legislation" the other provisions of the Fourteenth Amendment. When used in the context of "enforcing" a rule or prohibition, the word "enforce" means to "compel obedience to." Random House Unabridged Dictionary 644 (2d ed. 1993). *Cf. City of Boerne*, 521 U.S. at 517 (Congress may pass laws under Section 5 that "tend[] to enforce submission to the prohibitions [the fourteenth amendment] contain[s]" *quoting Ex parte Virginia*, 100 U.S. 339, 345-46 (1879)); *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Bd.*, 119 S. Ct. 2219, 2224 (1999) ("the term 'enforce' is to be taken seriously"). In regulating private conduct like that alleged in this case, Subtitle C fails this most fundamental test of validity.

If a jurisdiction failed to arrest criminals, and did not permit tort suits against them for the harm they caused, but instead offered a compensation package to those injured by crime, no one would say that that jurisdiction was "enforcing" its criminal law. So, too, here. Subtitle C does not "compel obedience" or "submission" to the prohibitions of Section 1 because it does not prohibit or deter states or state officials from doing anything. For the same reason, it does not "enforce" any citizen's right to equal treatment *from* a state or state official.[14]

Petitioners' linguistic device is to use words like

[14] The United States suggests that Subtitle C enforces Section 1 prohibitions by allowing crime victims to avoid state justice systems. U.S. Br. 44 n.24. (Under this theory, it seems, Congress can "enforce" Section 1 by taking whole areas of authority from the states, and thus avoiding any possible Section 1 violations in those areas.) Even assuming that would be proper "enforcement" legislation, Subtitle C does not allow any victim to avoid state criminal processes.

"correct" and "remedy" that this Court has used in the past as synonyms for "enforce," or as examples of ways to enforce the Section 1 prohibitions, and to use those words so that they no longer have any connection with the text of Section 5. For example, one can "correct" or "remedy" an Equal Protection violation, and even simultaneously "correct the effects" of that violation, by permitting a civil lawsuit against a state official who perpetrated the violation. This would deter state officials generally from committing those violations and thus "enforce" (or compel obedience to) the Section 1 prohibition against unequal protection. But this Court has never held that one can "correct the effects" or "remedy" a Section 1 violation simply by providing a mechanism for obtaining compensation for the victim, through either a general fund or a civil suit against a private party. That does not "enforce" anything in Section 1. This Court has never ruled otherwise.

B. This Court's Binding Authority Undermines Petitioners' Section 5 Argument

In *United States v. Harris*, 106 U.S. 629 (1883), the Court considered the criminal provisions of Section 2 of the Civil Rights Act of 1871 (17 Stat. 13) (also known as the Ku Klux Klan Act).[15] The legislative history of that law is well known, and was described by the Fourth Circuit in

[15] The criminal provision of Section 2 provided that "if two or more persons in any state or territory conspire or go in disguise upon the highway or on the premises of another for the purpose of depriving either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any state or territory from giving or securing to all persons within such state or territory the equal protection of the laws, each of said persons shall be punished . . ." *Harris*, 106 U.S. at 629.

great detail. Pet. App. 119a-20a, 124a-25a. *See also, e.g.*, *Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 722 (1989) ("The immediate impetus for the bill was evidence of widespread acts of violence perpetrated against the freedmen and loyal white citizens by groups such as the Ku Klux Klan"); *Patsy v. Bd. Of Regents Of State Of Florida*, 457 U.S. 496, 505-06 (1982) ("A major factor motivating [the bill, including § 2] was the belief of the 1871 Congress that the state authorities had been unable or unwilling to protect the constitutional rights of individuals or to punish those who violated these rights"; citing legislative history and noting "the mistrust that the 1871 Congress held for the factfinding processes of state institutions").

Despite this legislative history, this Court rejected Section 5 of the Fourteenth Amendment as a basis for reaching private conduct under the Ku Klux Klan Act. *Harris*, 106 U.S. at 637-40. Quoting a decision of Justice Bradley sitting as a circuit court judge, the Court held that Section 5 "is a guaranty of protection against the acts of the state government itself":

> [T]he power of congress . . . to legislate for the enforcement of such a guaranty, does not extend to the passage of laws for the suppression of crime within the states . . . The enforcement of the guaranty does not require *or authorize* congress to perform "the duty that the guaranty itself supposes it to be the duty of the state to perform, and which it requires the state to perform."

Harris, 109 U.S. at 638 (*quoting United States v. Cruikshank*, 25 F. Cas. 707, 710 (C.C.D. La. 1874) (No. 14897), *aff'd*, 92 U.S. 542 (1875)) (emphasis added)). In addition, this Court also specifically rejected the idea that systemic bias (without a showing of any bias or other equal

protection violation in the specific case) permitted Congress to reach private conduct. *Id.* at 639 (the statute "is not limited to take effect only in case the state shall [violate the Fourteenth Amendment]. It applies, no matter how well the state may have performed its duty . . . In the indictment *in this case* . . . there is no intimation that the state of Tennessee has passed any law or done any act forbidden by the fourteenth amendment" (emphasis added)).

In the *Civil Rights Cases*, 109 U.S. 3 (1883), decided later that same year, this Court considered the constitutionality of the first two sections of the Civil Rights Act of 1875 (18 Stat. 335). That law provided all persons in the United States the right to "the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement" regardless of race or color or previous condition of servitude. It provided for criminal sanctions and civil suits against those who refused to provide such equal treatment, but gave plaintiffs an election of "proceed[ing] under their rights at common law and by state statutes." Id. at 9.

The purpose of the legislation was manifest from its well-known legislative history, which is again described at length in the opinion of the Fourth Circuit. Pet. App. 120a-21a. Throughout the course of extended debates on the law, lasting from 1871 to its passage in 1875, Congress repeatedly heard that the states were failing to enforce then-existing common-law and statutory rights of African-Americans to equal treatment. *Id.*

This Court found the first two sections of the 1875

Act unconstitutional.[16] The Court noted that Section 1 was "prohibitory in its character, and prohibitory upon the states." *Id.* at 10. In considering the scope of Section 5, it asked rhetorically: "To enforce what? To enforce the prohibition [in Section 1]." *Id.*, 103 U.S. at 11. The "power given to congress to legislate [was] for the purpose of *carrying such prohibition into effect*." *Id.* (emphasis added). But the statute there, *despite* its legislative history demonstrating a failure by the states to protect the rights of African Americans, did not "carry such prohibition into effect" because it did not attempt to correct improper *state* action. Thus, this Court concluded, the first two sections were "not corrective legislation" because they were "primary and direct . . . tak[ing] immediate and absolute possession of the subject of the right of admission to inns, public conveyances, and places of amusement." *Id.* at 19. In short, this Court ruled that Congress, in an effort to remedy perceived defects in state procedure pursuant to its admitted authority under Section 5 of the Fourteenth Amendment, could not *replace* that procedure with its own to act directly on individual conduct.

This Court has reaffirmed the holdings of *Harris* and the *Civil Rights Cases*, and the principles that Congress's power to "enforce" the Section 1 prohibitions does not extend to passing laws against private conduct. *E.g.*, *City of Boerne*, 521 U.S. at 524-25 (reaffirming Section 5 analysis of, *inter alia*, the *Civil Rights Cases* and *Harris*;

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[16] This Court contrasted the first two sections of the Civil Rights Act of 1875 with the fourth section, which precluded disqualification of a citizen from jury duty on the basis of race or color, and which had been sustained in *Ex Parte Virginia*, 100 U.S. 339 (1879). This Court found that an indictment against a *state officer* under that fourth section to be "entirely corrective in its character." *Civil Rights Cases*, 109 U.S. at 15.

"The power to 'legislate generally upon' life, liberty, and property, as opposed to the 'power to provide modes of redress' *against* offensive state action, was 'repugnant' to the Constitution" (emphasis added), *quoting* the *Civil Rights Cases*, 109 U.S. at 15); *id.* at 545-46 (O'Connor, J., dissenting) (agreeing with Court's Section 5 analysis); *General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 386, 390 n.17 (1982) (although 42 U.S.C. §§ 1981 and 1982 reached private conduct, and although the "principal object [of their passage] . . . was to eradicate the Black Codes, laws enacted by Southern legislatures imposing a range of civil disabilities on freedmen," the statute's reach to private conduct could not depend upon Section 5 of the Fourteenth Amendment: "we relied on [Thirteenth Amendment] heritage in holding that Congress could constitutionally enact § 1982 . . . *without limiting its reach to 'state action'*" (emphasis added)); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982) (citing the *Civil Rights Cases* and stating that "[c]areful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of *federal law* and *federal judicial power*" (emphasis added)).[17]

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[17] This well-recognized limit on federal legislative power is consistent with the rejection of the Bingham Amendment, described in detail in *City of Boerne*, 521 U.S. at 520-24. That proposal might have given Congress the right to act directly on private conduct to protect people's rights, and its defeat demonstrated the country's unwillingness to so radically change the constitutional design. *E.g.*, Alfred Avins, *Federal Power To Punish Individual Crimes Under The Fourteenth Amendment: The Original Understanding*, 43 Notre Dame Lawyer 317, 327 (1968) ("The remedy that Congress did propose [in the Fourteenth Amendment] was that if state officials were derelict in their duty . . . then under the fifth section Congress could enforce the first section by punishing such state officials for their willful dereliction . . . But *in no event* did the framers in the Thirty-Ninth

(continued...)

Petitioners' efforts to distinguish *Harris* and the *Civil Rights Cases* expose their "breathtaking ahistoricism" (Pet. App. 123a). They do not even try to dispute the Fourth Circuit's extensive description of the legislative history of the Civil Rights Acts of 1871 and 1875, demonstrating (as this Court noted in *Patsy*) that the Reconstruction Congress was trying to "remedy" failures in state processes and state enforcement of the rights of African Americans. Brzonkala just claims that there were no constitutional violations involved in either case. Brzonk. Br. 47-48. Not only is this historically absurd, it is precisely the opposite of her position in the lower court. Brzonk. Fourth Circuit Principal Br. 33 (the remedy in Subtitle C is "*much like the Reconstruction-era statutes* [that] addressed systematic, and frequently private, acts of racially-motivated violence, driven by prejudice *and aggravated by failed state law enforcement systems*" (emphasis added)).

The United States asserts that both statutes failed because the Congresses that passed them thought that private conduct could violate the Fourteenth Amendment. U.S. Br. 46-47. To support this proposition, it cites only the fact that the 1871 Act used the words "equal protection of the laws." It cites nothing at all from the first two sections of the 1875 Act (other than the fact that, just like Subtitle C, it reached private conduct), nor does it respond to the Fourth Circuit's conclusion that Congress had the same misunderstanding about Subtitle C. Pet. App. 153a.

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[17](...continued)
Congress contemplate that private criminals could be punished by federal authority under the fifth section of the fourteenth amendment. The defeat of the original Bingham draft shows that Congress wanted to foreclose even the *possibility* that such a power might be derived from the proposed amendment" (emphasis added)).

There are many things wrong with this argument, even assuming that it would be appropriate to decide the scope of Congress's power based on what it "thought" instead of what it did. First, it just blinks reality to argue that Congress was not trying to remedy state failures to enforce the laws in the civil rights statutes at issue in those cases. Second, there is nothing in either opinion that supports the United States's theory. Indeed, *Harris* specifically approved the "erroneous" proposition that the United States attributes to Congress. *Harris*, 106 U.S. at 643 (private parties can deprive another of the "equal protection of the laws"). Rather, both cases were decided upon the fact that the statutes operated uniformly without regard to remedying a specifically-identified Section 1 violation, did not act upon the states or state officials, and thus did not render state violations "effectually null, void and innocuous." *Civil Rights Cases*, 103 U.S. at 11.

Both petitioners briefly mention *dicta* from *United States v. Guest*, 383 U.S. 745 (1966) and *District of Columbia v. Carter*, 409 U.S. 418 (1973) to suggest that Congress can directly reach private action. Brzonk. Br. 47; U.S. Br. 47-48. They make no effort to address the Fourth Circuit's extensive discussion of those cases (Pet. App. 136a-41a), which effectivly rebuts any such suggestion.

C. Section 13981 Is Not A Congruent And Proportional Response To Likely Constitutional Violations

Congress also has the authority under Section 5 to pass "preventive" or "prophylactic" rules addressed to conduct that does not necessarily violate Section 1. *City of Boerne*, 521 U.S. at 532 ("Preventive measures prohibiting certain types of laws may be appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of

being unconstitutional"). As the Fourth Circuit recognized, this Court has never sanctioned such "preventive" rules applied to purely private conduct. Pet. App. 128a-30a. As it also correctly held, even as an original matter, Subtitle C cannot be construed as "preventive" legislation.

1. Legislative History Does Not Demonstrate Widespread Violations Of The Fourteenth Amendment. -- Prophylactic rules reaching conduct that does not itself violate the Fourteenth Amendment may be proper when Congress is responding to widespread violations of a particular kind. *Florida Prepaid Postsecondary Education Expense Bd. v. College Savings Bank*, 119 S. Ct. 2199, 2210 (1999) (Patent Remedy Act was not proper prophylactic legislation under Section 5 because "[t]he legislative record thus suggests that [it] does not respond to a history of 'widespread and persisting deprivation of constitutional rights' of the sort Congress has faced in enacting proper prophylactic legislation" *quoting City of Boerne*, 521 U.S. at 526).

The legislative history of Subtitle C is similarly wanting. While anecdotal instances of "state bias" were identified, the legislative history generally reveals that states are making great efforts to combat all forms of violence against women. Pet. App. 155a-56a. Even the United States concedes that the States have not "established a deliberate policy of discriminating against women" or even against "victims of gender-motivated violence." U.S. Br. 42. (Conspicuously, petitioners' state amici make no Section 5 argument at all. *Cf.* Brief of Amici Arizona, *et al.*, 2 (state efforts to combat gender-motivated violence have been "substantial").

The "evidence" relied upon by petitioners further supports the Fourth Circuit's conclusion. Petitioners argue that systemic discrimination is reflected by marital rape

exceptions, limiting rape shield laws to criminal prosecutions (thus "expos[ing] women bringing tort actions for sexual assault to intrusive questioning" (Brzonk. Br. 14)), failing to pass hate-crime laws which include gender, jury instructions suggesting that rape charges are hard to both prove and disprove, and requiring corroboration from complaining witnesses. Brzonk. Br. 14-16; U.S. Br. 8. But while these things might not represent good policy, they do not reflect the intent to discriminate that the Fourteenth Amendment requires.[18]

Petitioners also assert that states take "gender-motivated" crimes less seriously than other crimes. Brzonk. Br. 15; U.S. Br. 8, 37, 38. Assuming *arguendo* the truth of this counterintuitive claim, petitioners do not contend that the victims of such crimes are *exclusively* women or that male victims of such crimes are treated better than female victims. Their efforts to show that states take these crimes less seriously than others *because* the victims are disproportionately women amount to *ipsè dixit* assertions of long-discarded doctrines.[19] These are not examples of

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[18] Tort immunity, for example, although it has been eliminated virtually everywhere for severe intentional torts, was justified in recent years only by the state interest in marital harmony and avoiding potentially fraudulent claims against insurance companies. *Thompson v. Thompson*, 218 U.S. 611 (1910); *Paiewonsky v. Paiewonsky*, 446 F.2d 178, 182 (3d Cir. 1971); *Nicpon v. Nicpon*, 145 Ill. App. 3d 464, 495 N.E.2d 1193 (1986); *Varholla v. Varholla*, 56 Ohio St. 2d 269, 383 N.E.2d 888 (1978).

[19] The lower rates of conviction and prosecution, for example, might be attributable to the well-known phenomenon, discussed during the hearings on VAWA, of victims declining to assist in prosecuting certain crimes. *Fletcher v. Town of Clinton*, 1999 WL 997806, *8 (1st Cir. Nov 8, 1999) (noting evidence that a high percentage of domestic violence victims are uncooperative).

gender-based violations of the Equal Protection clause. *Personnel Administrator v. Feeney*, 442 U.S. 256, 272 (1979) (rules or practices with disproportionate impact are unconstitutional only if they can be traced to an unconstitutional purpose).[20]

Petitioners cite various lower court cases to demonstrate that state failure to take certain crimes seriously constitute "equal protection" violations. U.S. Br. 41; Brzonk. Br. 44 n.17. Not one of these cases found a sex-discriminatory policy after trial. Two of their cases simply found that allegations stated a cause of action. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 701 (9th Cir. 1988) (*pro se* complaint liberally construed); *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984). Another (*Hynson v. City of Chester*, 864 F.2d 1026, 1033 (3d Cir. 1988)) simply remanded the case to the district court to apply a new legal standard it had stated. The last, *Watson v. Kansas City*, 857 F.2d 690 (10th Cir. 1988), actually affirmed the *dismissal* of a claim for sex discrimination, finding no evidence of a discriminatory purpose, and found only an issue of fact as to whether the city treated domestic violence cases differently from other cases.[21] *See also McKee v. City of Rockwall*, 877 F.2d 409, 416 (5th Cir. 1989) (en banc) (no evidence of either sex discrimination or

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[20] Nor do they violate due process. *DeShaney v. Winnebago County Dep't Of Social Services*, 489 U.S. 189, 197 (1989) ("a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause").

[21] That claim would be subject to rational basis scrutiny, and the issue of whether it could be justified under such scrutiny was not before the court in *Watson*. *Cf. Eagleston v. Guido*, 41 F.3d 865, 878 (2d Cir. 1994) (differential treatment of domestic violence passes rational basis scrutiny).

differential treatment for domestic violence cases).

In short, "widespread and persisting deprivation of constitutional rights" is wholly absent from both the legislative history and petitioners' cases.

2. Subtitle C Is Not Congruent And Proportional. -- This Court has held that prophylactic legislation must have "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Florida Prepaid*, 119 S. Ct. at 2206, *quoting City of Boerne*, 521 U.S. at 519-20. Here, Subtitle C cannot be deemed proportional to the injury claimed. As both courts below recognized, any coincidence between a Section 1 violation and a claim under Section 13981 is pure fortuity. State failure can occur outside of gender-based animus-motivated felonies and those felonies can take place in the many states in which state procedures are adequate. Pet. App. 160a-63a, 399a-401a. And, of course, Subtitle C does nothing to the purported state violators of Section 1.

Perhaps petitioners focus on so many different purported flaws in the state systems in the hopes that this Court will not notice that Subtitle C is not a particularly good remedy for any one of them. If marital tort immunities are the problem, Subtitle C's application to torts between non-married people and its application to the vast majority of states that have abrogated that exemption, is grossly overbroad. If actors in the state criminal justice system are the problem, a civil lawsuit does not remedy it, certainly not more than the remedy the states already provide: a civil tort remedy that does *not* require a showing of gender-animus and where "the victim, not a state prosecutor, controls the process." U.S. Certiorari Petition Reply Br. 9 n.2. *Cf.* U.S. Br. 19. If state evidentiary rules or other aspects of state civil jury trials are the problem, it makes no

sense to give, as Congress did, non-removable concurrent jurisdiction to the states.[22] And if the problem is that the gender-bias in society has permeated aspects of the state court system in general, a remedy in federal court will not solve the problem. Federal court task forces find the same phenomenon. *See, e.g., The Effects of Gender In The Federal Courts: The Final Report Of The Ninth Circuit Gender Bias Task Force*, 67 S. Cal. L. Rev. 745 (1994); *The Gender, Race, and Ethnic Bias Task Force Project In The D.C. Circuit* (1995).[23]

D. Petitioners' Theory Would Grant Congress An Unlimited General Police Power

In *City of Boerne*, 521 U.S. at 529, this Court held that if Congress could define its own powers under Section 5, "it is difficult to conceive of a principle that would limit congressional power." As the Fourth Circuit found, perceptions of bias in our state court systems are not limited to their response to violent acts motivated by gender animus. Pet. App. 74a-75a; 164a-66a. Indeed, the task force reports relied upon by Congress generally find bias in most of

[22] State rules of practice apply in state court even when federal rights are at issue. *Wolfe v. North Carolina*, 364 U.S. 177, 195 (1960); 16B Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction 2d*, § 4023 (1996).

[23] Petitioners and/or Congress's reliance on the lenient sentences given rapists (Brzonk. Br. 16) is misplaced for the same reason. Rape sentences are shorter in federal court. American Bar Ass'n, *The Federalization Of Criminal Law* 30 (1998) (Chart 7 illustrating Department of Justice statistics).

domestic relations law.[24] Some scholars have argued that much of criminal, tort, and contract law contains inherent bias. Pet. App. 74a-75a (citing authorities); *Developments In The Law -- Race and the Criminal Process*, 101 Harv. L. Rev. 1472 (1988) (arguing that bias pervades criminal justice system). Petitioners' theory would allow Congress to legislate comprehensively in all such areas just by finding "systemic" bias.

Further, the Equal Protection Clause is not the only provision in Section 1 of the Fourteenth Amendment. Appellants suggest no reason why, under their theory, Congress's Section 5 authority should not enable it to enforce the Due Process Clause against private deprivations of property by, say, pickpockets if it deems the states to be inadequately attentive to this class of crime. *Compare Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 278 (1993) ("A burglar does not violate the Fourth Amendment, for example, nor does a mugger violate the Fourteenth").

[24] *E.g., Final Report Of The Task Force On Racial And Ethnic Bias And Task Force On Gender Bias In The D.C. Courts* 169 (1992) ("courts hold mothers to a higher standard of behavior"); *Gender and Justice: Report of the Vermont Task Force on Gender Bias in the Legal System* 101 (1991) (courts place more weight on "[w]omen's alleged misconduct during marriage and following separation" than men's in awarding custody); *Louisiana Task Force on Women in the Courts, Final Report* 64-65 (1992) (sexual stereotyping works against both sexes in different contexts); *Report of the Fairness and Equality Committee of the Supreme Court of Idaho* 12 (1992) ("women are held to a higher and different standard than fathers and are judged more harshly than men"); *Final Report of the Equality in the Courts Task Force, State of Iowa* 131 (1993) (citing stereotypes "that operate to the disadvantage of women (they are subject to heightened moral scrutiny and heightened scrutiny of parenting and personal behavior than fathers)").

III. THE AMENDED COMPLAINT FAILS TO STATE A CAUSE OF ACTION UNDER SECTION 13981

For the reasons stated in the brief of Respondent Crawford, this Court may affirm the judgment of the Fourth Circuit on the ground that the amended complaint in this action did not state a cause of action under Section 13981.

CONCLUSION

The judgment of the *en banc* Court of Appeals should be affirmed.

Respectfully submitted,

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In The

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

ANTONIO J. MORRISON, ET AL.,

Respondents,

CHRISTY BRZONKALA,

Petitioner,

v.

ANTONIO J. MORRISON, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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I. THE CIVIL RIGHTS REMEDY IS A NECESSARY AND PROPER EXERCISE OF CONGRESS' AUTHORITY TO REGULATE INTRASTATE ACTIVITY THAT SUBSTANTIALLY AFFECTS INTERSTATE COMMERCE.

This Court has made clear that Congress' power under the Commerce Clause to regulate intrastate activity that "substantially affects" interstate commerce is derived from and limited by the text of the Necessary and Proper Clause. See, *e.g.*, *New York* v. *United States*, 505 U.S. 144, 158 (1992); *accord Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 584-85 (1985) (O'Connor, J., dissenting); Brzonkala Br. 36. Indeed, Respondent Morrison concedes this, stating that it is the Necessary and Proper Clause that "permits Congress to reach intrastate commerce that 'substantially affects' interstate commerce." Morrison Br. 33.[1]

Respondents err, however, in asking this Court to substitute for the Necessary and Proper test set forth in the Constitution itself, a requirement that the intrastate activity be "economic." Respondents propose a rigid bright line rule that would bar congressional regulation of any and all intrastate activity that is not "economic," no matter how substantial, large and debilitating the effects of that activity on the national economy and interstate commerce. See, *e.g.*, Crawford Br. 21 ("Congress

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[1] Indeed, the sole recent case Respondents cite addressing the Necessary and Proper Clause, *Printz* v. *United States*, 521 U.S. 898 (1997), actually supports Brzonkala's position that the Clause provides meaningful limits. See Morrison Br. 32. There, the Court struck a congressional regulation that, unlike here, commandeered state law enforcement personnel to enforce a federal law regulating commercial activity, finding that it was not "proper" under the Necessary and Proper Clause because it unduly intruded on state sovereignty. *Printz*, 521 U.S. at 923-24; *see infra* at 10-12.

cannot regulate conduct wholly non-economic in nature."); Morrison Br. 14-15. Such extreme formalism is not only contrary to this Court's precedents, it is impractical and would disable Congress from protecting the national economy and interstate commerce from current and future threats.

The only argument Respondents muster to support their extreme position is the assertion that Petitioner's position lacks principled and meaningful limits on the commerce power and is therefore equally extreme. See, *e.g.*, Morrison Br. 33-35; Crawford Br. 20-25. However, the limits Petitioner Christy Brzonkala ("Brzonkala") has articulated are principled and significant, respect federalism principles, and are supported by the text of the Constitution and this Court's Commerce Clause decisions.

A. The Four Factors Identified By Petitioner Implement The Limits Of The Necessary And Proper Clause And Support The Civil Rights Remedy's Constitutionality.

The four factors identified by Brzonkala establish meaningful limits on Congress' power to regulate non-economic activity under the Commerce Clause. Brzonkala Br. 22-35. Together, those four factors help implement the textual limitations prescribed by the Necessary and Proper Clause, and preserve the dual sovereignty that is the genius of our federal system.

Two preliminary points deserve reemphasis. *First*, consistent with *United States* v. *Lopez*, 514 U.S. 549 (1995), the four factors help ensure that the occasions in which Congress may regulate non-economic intrastate activity are relatively rare compared to the occasions when Congress may regulate economic intrastate activity under the Commerce Clause. *Second*, contrary to Respondents' suggestion, Brzonkala does not maintain that the presence of

any single factor alone would be sufficient to sustain congressional regulation of non-economic activity. Brzonkala Br. 22. Rather, under the appropriate practical approach, *Lopez*, 514 U.S. at 572-73 (Kennedy, J., concurring), the Court should evaluate the collective weight of the combined factors on a case-by-case basis.[2] Because all four factors strongly support the Civil Rights Remedy, it is properly within the meaningful limits on federal power established by the Constitution.

1. The Civil Rights Remedy, Like Other Civil Rights Statutes, Combats Conduct That Creates A Substantial, Discriminatory Barrier To Participation In The National Economy.

The inquiry whether a statute is intended to address discriminatory activity that creates a barrier to the full participation of a specific group in interstate commerce and the national economy helps to implement both elements of the Necessary and Proper Clause. Federal regulation of discriminatory activity is *proper* because civil rights legislation is a traditional responsibility of the federal government. Such legislation is also *necessary* to the full and free flow of commerce. See *Katzenbach* v.

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[2] Crawford quotes Justice Cardozo but ignores that he was this century's great opponent of legal formalism. Crawford Br. 22 n.5. As Justice Cardozo stated: "We are tending more and more toward an appreciation of the truth that, after all, there are few rules; there are chiefly standards and degrees." Benjamin N. Cardozo, *The Nature of the Judicial Process* 102, 161 (1921). Justice Cardozo thus warned that judges should be on guard against "times when the demon of formalism tempts the intellect with the lure of scientific order." *Id.* at 66, 90. He specifically warned that courts must not use formalistic rules to substitute their judgment for that of the legislature: "One department of the government may not force upon another its own standards of propriety." *Id.* at 90 (internal citations omitted).

McClung, 379 U.S. 294, 302 (1964) (anti-discrimination statute could reach activities "which directly or indirectly burden or obstruct interstate commerce"). As Congress found here and in the 1964 Civil Rights Act, because discriminatory conduct singles out a particular group of people, members of that group are very likely to take such discrimination into account when determining whether – and where – to engage in economic activity. Compare *id.* at 300 ("discrimination deterred professional, as well as skilled, people from moving into areas where such practices occurred and thereby caused industry to be reluctant to establish there"),[3] with S. Rep. No. 101-545, at 43 (1990) ("Gender-based crimes and the fear of gender-based crimes restricts movement, reduces employment opportunities, . . . and reduces consumer spending, all of which affect interstate commerce and the national economy"), and S. Rep. No. 103-138, at 54 (1993) ("[e]ven the fear of gender-based violence affects the economy because it deters women from taking jobs in certain areas or at certain hours that pose a significant risk of such violence"); see also Brzonkala Br. 7-8, 10-13, 23-26.

This first factor constitutes a significant limitation on federal power because it supports only legislation designed to protect a specific group from discrimination.

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[3] The legislative history of the Civil Rights Act of 1964 shows that Congress was responding to the effects of discrimination on the broader economy, not simply to whether or not the conduct it sought to regulate was itself economic. *See, e.g.*, H.R. Rep. No. 88-914 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2498 (views of Republican members in support of bill) (racial disputes and discrimination had negative effect on business conditions generally, including investment choices and business opportunities, *e.g.*, plants and companies deciding not to locate in Southern cities).

Non-discriminatory barriers to commerce, such as inadequacies in general education programs, fall outside this factor's scope.

Contrary to Respondents' assertion, the GFSZA in *Lopez* did not satisfy this factor because it did not involve discrimination, *i.e.*, the possession of a gun near a school does not discriminate against any particular group. For the same reason, the "parade of horribles" trotted out by Respondents and their *amici*, including a national murder or wrongful death law, and laws addressing insomnia and the like, would not be supported by this factor. The Civil Rights Remedy, which plainly is anti-discrimination legislation, squarely fits. See Brzonkala Br. 7-8, 10-13, 23-26.

2. Congress Reasonably Found That Gender-Motivated Violence Substantially Affects Interstate Commerce.

Whether Congress had a reasonable basis for determining that the activity at issue, "whatever its nature," substantially affects interstate commerce, lies at the heart of the Commerce Clause analysis. See *Lopez*, 514 U.S. at 556 ("[e]ven if [an] activity be local and though it may not be regarded as commerce, it may still, *whatever its nature*, be reached by Congress if it exerts a substantial economic effect on interstate commerce") (emphasis added); *id.* at 557 (Court reviews whether Congress had "rational basis"); *id.* at 559; *accord* Morrison Br. 14, 22 n.6.

Respondents argue that this factor simply does not apply when the activity is non-economic. Crawford Br. 21; Morrison Br. 14. Thus, under Respondents' proposed rule, Congress would be powerless to address even dire national emergencies that were devastating to the economy, if the underlying activity were not "economic." For example, if a potent virus were spreading rapidly within many states, threatening – like the influenza epidemic of

1918-19 – to kill millions of citizens and devastate the national economy, and the States were unable effectively to combat this virus, Congress could not regulate to combat the virus, because neither the disease nor its spread is an "economic" activity.

Not only does the "substantially affects" factor apply to regulation of non-economic activity, it also helps to implement the "necessary" limitation of the Necessary and Proper Clause. As Respondents concede, the requirement that Congress make a *reasonable* determination imposes a meaningful limitation on federal power. *See* Morrison Br. 27 (citing, *inter alia, Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Sav. Bank*, 119 S. Ct. 2199 (1999)). In addition to *Lopez*, this Court has on several recent occasions struck laws as unconstitutional under rational basis review. See, *e.g.*, *Romer* v. *Evans*, 517 U.S. 620, 634-36 (1996); *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432 (1985).

Respondents also misconstrue Petitioner's argument concerning congressional findings. Brzonkala does *not* contend that Congress is *required* to make findings in order to support an exercise of its commerce power. Rather, as *Lopez* recognized, the presence of express congressional findings, like those supporting the Civil Rights Remedy, can help the Court find that Congress had a reasonable basis for its conclusion that the regulated activity substantially affects interstate commerce. See *Lopez*, 514 U.S. at 563. Put another way, it is easier for this Court to defer to Congress' reasonable exercise of its "substantial discretion," *id.* at 577 (Kennedy, J., concurring), when there is a record that such discretion was, in fact, exercised.

Contrary to Respondents' contention, the Court in *Lopez* unequivocally stated that " '[n]either the statute nor its legislative history contain[s] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone.' " *Id.* at 562 (quoting

United States brief).[4] Respondents refer to subsequent Congressional findings made nearly four years after the GFSZA's enactment. See Morrison Br. 24-25 n.9. But the fact that the Congress that enacted the GFSZA did not exercise an informed "discretion," *Lopez*, 514 U.S. at 577 (Kennedy, J., concurring), can not be changed by the post-hoc rationalizations of a subsequent Congress. Cf. *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988) (reasonableness of agency regulations may not be defended based on agency's post-hoc rationalizations); *SEC* v. *Chenery Corp.*, 318 U.S. 80, 92-95 (1943) (agency may not support reasonableness of decision based on subsequent conclusions that did not form the basis for decision). *Lopez* made clear that the government properly did "not rely upon these subsequent findings as a substitute for the absence of findings in the first instance." 514 U.S. at 562 & 563 n.4.

In contrast, the findings supporting the Civil Rights Remedy are contemporaneous, thorough, supported by empirical data, and eminently reasonable. Although Respondents level various criticisms at selected portions of the congressional findings, and make clear that they disagree with Congress' policy decision, at no point do they argue that it was *unreasonable* for Congress to find that gender-motivated violence against women substantially affects the economy and interstate commerce. Rather, the four-year legislative record and findings supporting the Civil Rights Remedy amply demonstrate that the adverse effects on interstate commerce of gender-motivated violence are "substantial." H.R. Conf. Rep. No. 103-711, at 385 (1994) ("1994 Conf. Rep."); Brzonkala Br. 10-13; cf. *Hodel* v. *Virginia Surface Mining & Reclamation*

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[4] Moreover, as the Court made clear, there was no reasonable basis for concluding that mere *possession* of a gun *near* a school has a substantial effect on interstate commerce. *Lopez*, 514 U.S. at 563-67.

Ass'n, 452 U.S. 264, 277-80 & n.19 (1981) (upholding statute after reviewing six-year legislative record).

Respondents' assertions that some supporters of the Civil Rights Remedy sought to combat morally opprobrious conduct are irrelevant. See Morrison Br. 2-5; Crawford Br. 5-8. For example, *Heart of Atlanta Motel* v. *United States* expressly holds that the fact that a civil rights law also "legislat[es] against a moral wrong" in no way lessens the legitimate scope of the commerce power. 379 U.S. 241, 257 (1964); *see also Mulford* v. *Smith*, 307 U.S. 38, 48 (1939) ("The motive of Congress in exerting the [Commerce Clause] power is irrelevant to the validity of the legislation.") (citing J. Story, *Commentaries on the Constitution* §§ 965, 1079, 1081, 1089 (4th ed.)).

Surprisingly, Morrison criticizes the Civil Rights Remedy for regulating too narrowly, contending that "gender-motivated" violence does not itself, as a "subset" of violence against women, substantially affect interstate commerce. See Morrison Br. 4, 23-24. Morrison ignores that Congress expressly and reasonably found that gender-motivated violence constitutes a significant, and particularly intractable and pernicious, portion of all violence against women, and thus that "crimes of violence motivated by gender have a substantial adverse effect on interstate commerce." 1994 Conf. Rep. 385; see also 42 U.S.C. § 13981(a) (purpose of Civil Rights Remedy is "to protect the civil rights of victims of gender motivated violence and [thus] promote . . . activities affecting interstate commerce"); Brzonkala Br. 10-11, 26 (quoting legislative history that "[g]ender-based violence bars its most likely targets – women – from full participation in the national economy"). Moreover, no such finding is required. See, *e.g.*, *Katzenbach* v. *McClung*, 379 U.S. at 304-05 (rejecting challenge to 1964 Civil Rights Act based on the "absence of direct evidence connecting discriminatory restaurant service with the flow of interstate food").

If anything, federalism is advanced by Congress' limitation of the Remedy to where the need is most acute and any potential intrusion on state functions most limited. It is well-established that Congress may address the core portion of a problem, and is not required to address all aspects of a broader problem simultaneously. See, *e.g.*, *FCC* v. *Beach Communications, Inc.*, 508 U.S. 307, 316 (1993) ("Scope of coverage provisions are unavoidable components of most economic or social legislation. . . . [T]he legislature must be allowed leeway to approach a perceived problem incrementally"). Federalism would have to be turned on its head to invalidate the Civil Rights Remedy because it is not broad enough.

3. Congress Reasonably Found That The States Have Not Effectively Addressed The National Problem Of Gender-Motivated Violence.

The third factor, whether Congress reasonably found that the States are unable to address the problem posed by the activity, helps to implement the "necessary" component of the Necessary and Proper Clause and provides further principled and significant limits on congressional power. See *Perez* v. *United States*, 402 U.S. 146, 150 (1971) (relying on factor that "[t]he problem simply cannot be solved by the States alone"); *Hodel*, 452 U.S. at 280 (relying on "inadequacies in existing state laws"). Congress could not reasonably find, for example, that state criminal remedies for murder or tort remedies for wrongful death are generally inadequate.

The empirical evidence before Congress readily supports its conclusion that the States had not effectively confronted and addressed the problem of gender-motivated violence. See Brzonkala Br. 13-17, 30-31. In addition to formal and informal barriers in state justice systems, Congress found proof of systemic discrimination by the

States, including, to cite just one example, that "a rape case is more than twice as likely to be dismissed as a murder case and nearly 40 percent more likely to be dismissed than a robbery case," and that, even when convicted, "over one-half of all convicted rapists serve . . . 1 year or less in prison." S. Rep. No. 103-138, at 42 (1993). Moreover, as 36 State Attorneys General argue in this case: [t]he States' own assessments of their legal responses to violence against women demonstrate that state protections remain inadequate, and thus support congressional enactment [of the Remedy]." Brief of Arizona, et al. in Support of Petitioners, 15-16; *accord id.* at 2, 15-20. It has been recognized – from the creation of diversity jurisdiction through enactment of federal criminal and civil actions for corruption and misconduct by state officials – that the safeguards of the federal system are well-suited to combat biases when they are regrettably present in state-court adjudication. See Brzonkala Br. 31.

4. Congress Carefully Limited The Civil Rights Remedy To Minimize Intrusion On State Sovereignty, Avoid Displacement Of State Programs, And Preserve States' Ability To Address Gender-Motivated Violence.

By requiring an assessment of the degree to which congressional regulation intrudes on state sovereignty or displaces state programs or States' ability to address a problem, the fourth factor helps implement the "proper" element of the Necessary and Proper Clause. It provides a meaningful and principled limit on congressional power by proscribing congressional regulation that unduly intrudes on state functions. See, *e.g.*, *supra* at 1 n.1. Moreover, this factor preserves and protects the system of dual sovereignty that lies at the heart of our federal system, including the role of the States as "laboratories for experimentation." See *Lopez*, 514 U.S. at 574-77, 580-81 (Kennedy, J., concurring).

As Justices Kennedy and O'Connor emphasized in their concurring opinion in *Lopez* (the "Kennedy-O'Connor concurrence"), this fourth factor is an important consideration in determining whether congressional regulation of non-economic activity is within the limits of the commerce power. See *id.* at 580 (Kennedy, J., concurring) (where Congress seeks to regulate activity that is not directly of a "commercial character," a reviewing court "must inquire whether the exercise of national power seeks to intrude upon an area of traditional state concern").

Lopez itself illustrates that this fourth factor imposes a significant limit on congressional power. Contrary to Respondents' contention, the GFSZA did intrude on state functions and interfere with States' ability to effectively implement state programs to curb the abuse of firearms. These included programs to encourage "voluntary surrender of guns with some provision for amnesty," and inducements and incentives "to inform on violators," who would be subject to suspension or expulsion, but not criminal sanction. *Lopez*, 514 U.S. at 581-82 (Kennedy, J., concurring). The Kennedy-O'Connor concurrence made clear that an important factor in their conclusion was the degree to which the GFSZA displaced state regulation and "foreclose[d] the States from experimenting and exercising their own judgment in an area in which States lay claim by right of history and expertise," education. *Id.* at 583.

Respondents' contention that the degree of intrusion on state functions should be ignored would elevate formalism over the pragmatic substance of genuine federalism concerns. See, *e.g.*, Crawford Br. 27-28; Morrison Br. 30. Indeed, this contention ignores the express statement in the Kennedy-O'Connor concurrence that the Court should not strike down a federal statute on Commerce Clause grounds absent an "intrusion on state sovereignty" that is "significant." *Lopez*, 514 U.S. at 583.

By contrast, the Civil Rights Remedy provides a limited federal remedy for the national problem of gender-motivated violence, while carefully preserving state sovereignty and functions, and leaving ample room for additional state efforts to address the problem. Contrary to Respondents' contention, Crawford Br. 31-33, the Civil Rights Remedy leaves state criminal and tort laws undisturbed. The Remedy requires proof of particular statutory elements that render it distinct from general torts under state law. When state-law criminal prosecutions or state-law tort claims are brought, state laws restricting those remedies will not be pre-empted and will continue to have the same effect they had before the Civil Rights Remedy's enactment.[5]

B. In Any Event, Respondents Have Not Established A Basis For Facial Invalidation Of The Civil Rights Remedy.

As this Court has recently made clear, "[t]he traditional rule is that 'a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court.' " *Los Angeles Police Dep't* v. *United Reporting Publ'g Corp.*, 120 S. Ct. 483, 488 (1999) (quoting *New York* v. *Ferber*, 458 U.S. 747, 767 (1982)). *See also Broadrick* v. *Oklahoma*, 413 U.S. 601, 610 (1973). Indeed, it is questionable whether, because of the "personal nature of constitutional rights"

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[5] The broad area of intentional wrongdoing is not the exclusive province of state law. Although common law torts cover broad areas of intentional wrongdoing, numerous federal laws, like the Civil Rights Remedy, provide for civil statutory liability for intentional misconduct in specific areas, including, for example federal securities law, antitrust law, 42 U.S.C. § 1983, and civil RICO claims.

and "the prudential limitations on constitutional adjudication," the Court recognizes any basis for a facial constitutional challenge other than in the limited context of First Amendment overbreadth claims. *Los Angeles Police Dep't*, 120 S. Ct. at 489.[6]

As explained, Brzonkala Br. 41-42, the conduct alleged in this case involves a direct effect on economic activity, *i.e.*, the assault on Brzonkala prevented her enjoyment of the services and benefits from Virginia Tech for which she had contracted and paid. Because this case was decided on a Rule 12(b)(6) motion, her allegations must be liberally construed and accepted. *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957). Respondents make an impermissible facial challenge by relying on the specter of other, hypothetical, applications that they contend would offend federalism principles, Crawford Br. 31-33, but that they concede are not at issue here.[7]

For example, if a state statute codified the tort of libel and exceeded the limits of *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964) and its progeny by allowing damages for "any false statement," this Court would not even

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[6] Whether Respondents may raise a facial challenge to the Civil Rights Remedy is a standing issue and is thus properly before the Court. *See Broadrick*, 413 U.S. at 610-12. Moreover, Brzonkala raised the impropriety of a facial challenge in her Petition for Certiorari. Pet. 17 n.14. Respondents did not object in their Oppositions to Certiorari; any objection should therefore be deemed waived. Sup. Ct. R. 15.2.

[7] In contrast, the GFSZA was unconstitutional as applied in *Lopez*, and no argument was raised at that time or since that the statute would be constitutional under other circumstances. Moreover, the case against Lopez was not tried in the district court on the theory that his particular activity had a direct economic effect, *Lopez*, 514 U.S. at 551, 561-68, and it would have violated due process to affirm a criminal conviction on a different basis than that used in the trial court. *Chiarella* v. *United States*, 445 U.S. 222, 236-37 (1980).

consider striking that statute facially in a case where the facts presented a permissible application (*i.e.*, an application within the limits prescribed by *New York Times*). The statute in this case should be addressed similarly. As *Los Angeles Police Dep't* makes plain, the process of case-by-case adjudication is the constitutional norm and, contrary to Morrison Br. 19, is not akin to rewriting the statute.[8]

II. SECTION 5 CONSTITUTIONALLY ENFORCES EQUAL PROTECTION RIGHTS GUARANTEED BY THE FOURTEENTH AMENDMENT.

Brushing to the side the flotsam and jetsam of Respondents' many tangential contentions concerning Congress' Section 5 authority to enact the Civil Rights Remedy, Respondents set forth three basic arguments: 1) no equal protection violations are at issue; 2) the Remedy is not congruent or proportionate; and 3) Congress cannot regulate private action under Section 5. None of these arguments cast doubt on the Civil Rights Remedy's constitutionality.

First, the legislative record leading to the Civil Rights Remedy's enactment clearly identified equal protection

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[8] Crawford incorrectly argues that the constitutional issue can be avoided because Brzonkala's Amended Complaint failed to state a claim under the statute itself against Morrison or Crawford. Crawford Br. 38-40. The Court must reach the constitutional issue if a claim was stated as to Morrison, and each of the lower court judges correctly concluded that Brzonkala had, in fact, stated a claim of gender-motivation against at least Morrison. *Brzonkala v. Virginia Polytechnic*, 935 F. Supp. 779, 784-85 (W.D. Va. 1996); *Brzonkala* v. *Virginia Polytechnic Inst.*, 169 F.3d 820, 829-30 (4th Cir. 1999) (*en banc*); *id.* at 909 (Motz, J., dissenting). We will not dignify with a response Crawford's explanation that Morrison's statement that Brzonkala "better not have any fucking diseases" was an expression of "concern for self-preservation." Crawford Br. 40.

violations warranting Section 5 legislation. Respondents offer no analysis of why the stark examples of states' disparate and discriminatory treatment of victims of gender-based crimes, comprised in large part of the States' own studies and testimony, see Brzonkala Br. 13-17, 42-45; United States Br. 7-10, 38-40, are different from the record of equal protection violations this Court recently indicated is sufficient to support enforcement clause legislation. See, *e.g.*, *City of Boerne* v. *Flores*, 521 U.S. 507, 518, 525-27 (1997) (citing *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966); *Oregon* v. *Mitchell*, 400 U.S. 112 (1970); and *City of Rome* v. *United States*, 446 U.S. 156 (1980)). They fail even to mention Congress' record of the state gender bias task force findings, and do not contest that the record of states' discriminatory treatment and practices reflect the very kind of outdated stereotypes that fully support a finding of equal protection violations. See Brzonkala Br. 43-45; United States Br. 38-42. Respondents instead rest on the bald assertion that the record of discriminatory treatment of victims of gender-based crimes is not sufficient. Morrison Br. 44-45. However, even the court below conceded that the record "does establish that the States enforce and apply certain laws in a manner that may ultimately prevent the victims of gender-motivated violence from obtaining vindication through the criminal or civil systems." Pet. App. 153a.

Second, the civil rights statute Congress crafted is congruent and proportionate to the equal protection violations it identified, granting an alternative method of recovery for the very violent crimes Congress found states were treating in a discriminatory manner. See Brzonkala Br. 45-48; United States Br. 43-45. The logic behind this remedy is identical to that underlying numerous other federal damages remedies for civil rights violations, such as 42 U.S.C. §§ 1981, 1982, 1983, and especially 1985(3), which, like the Remedy, authorizes

civil damages for bias-motivated violence.[9] In addition, the Remedy is congruent and proportionate because federal civil rights suits arising from domestic violence or sexual assault cases can spur important reform. See, *e.g.*, *Violence Against Women: Victims of the System: Hearing Before the Senate Comm. on the Judiciary*, 102d Cong. 125 (1991) (statement of Gill Freeman, Chair, Florida, Supreme Court Gender Bias Study Implementation Commission) (stating that the Civil Rights Remedy will "increase the responsiveness of the states").

Morrison essentially objects that a congruent response would require a showing of state-sponsored discrimination in each case. Morrison Br. 47. But it is well established that Section 5 authorizes prophylactic legislation regulating conduct that itself does not violate the Constitution. *Florida Prepaid Postsecondary Educ.*, 119 S. Ct. at 2206 (citing *Boerne*, 521 U.S. at 517-18). The Civil Rights Remedy is an appropriate response because it avoids the intrusion that would occur from a suit against local law enforcement, see *Griffin* v. *Breckenridge*, 403 U.S. 88, 101 (1971), while still "correcting the effects" of States' discriminatory treatment by providing redress for victims of gender-motivated crime. See *Civil Rights Cases*, 109 U.S. 3, 13-14 (1883).

Contrary to Morrison's accusations that the law is overbroad and would amount to a general police power, Morrison Br. 48-49, the Civil Rights Remedy contains important limitations that "ensure Congress' means are

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[9] Indeed, Morrison contradicts his own argument by citing cases demonstrating that federal civil rights laws can provide an essential remedy when state law enforcement has proved unable to address bias-motivated violence. *See* Morrison Br. 38 (citing *Jett* v. *Dallas Indep. Sch. Dist.*, 491 U.S. 701, 713-27 (1989) (recounting legislative history of 42 U.S.C. §§ 1981, 1983); *Patsy v. Board of Regents*, 457 U.S. 496, 502-06 (1982) (legislative history of 42 U.S.C. § 1983)).

proportionate" to legitimate ends. *Boerne*, 521 U.S. at 532-33. By requiring proof of "gender-motivation" by the perpetrator in each case, the Remedy stays far away from the "constitutional shoals" of "a general federal tort law." *Griffin*, 403 U.S. at 102. Even if, as Morrison asserts, gender bias infects federal as well as state courts, Morrison Br. 48, an alternative forum removed from local politics may provide the only vehicle for meaningful relief, particularly in cases where familiarity compounds bias. See Brzonkala Br. 46. Only a federal law can ensure uniform enforcement of civil rights laws nationwide.

Third, neither *United States* v. *Harris* nor the *Civil Rights Cases* establish an absolute bar on regulating private conduct under Section 5 where, as here, Congress was responding to discriminatory state action. *United States v. Harris*, 106 U.S. 629 (1883); *Civil Rights Cases*, 109 U.S. 3 (1883).[10] Instead, the Court found both statutes impermissibly overbroad under the Thirteenth as well as the Fourteenth Amendments.[11] If the statutes' regulation of private conduct was the sole reason the Court rejected them under Section 5, they could have been upheld under the Thirteenth Amendment, which, unlike Section 5, can support direct congressional regulation of private conduct absent a link with discriminatory state action. See *Civil Rights Cases*, 109 U.S. at 23. That the Court rejected both statutes under the Thirteenth Amendment as well

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[10] Respondents imply that this Court recently has issued unqualified endorsements of these cases. Crawford Br. 38; Morrison Br. 40-41. However, this Court recently stated that "the specific holdings of these early cases might have been superseded or modified," while citing them for the proposition that Section 5 authority is "corrective" rather than "definitional," an issue not presented in this case. *Boerne*, 521 U.S. at 525.

[11] *Harris*, 106 U.S. at 639-40, 642-43; *Civil Rights Cases*, 109 U.S. at 14-19, 20-25.

confirms that it was the particular statutes' construction – not their regulation of private conduct – that was determinative.[12]

In finding both statutes overbroad under Section 5, the Court identified infirmities not present in the Civil Rights Remedy. In *Harris*, the Court was particularly concerned that the statute encompassed generic crimes entirely unrelated to the state-sponsored discrimination with which it was concerned, including a "conspiracy between two free white men against another free white man." 106 U.S. at 641. While the Court in the *Civil Rights Cases* endorsed the principle that Section 5 authorized corrective legislation such as the Civil Rights Remedy at issue here to counteract equal protection violations by the States, it struck the particular statute because it made "no reference whatever to any supposed or apprehended" equal protection violation, and presumed that private individuals could violate the Constitution. 109 U.S. at 13-14, 17.

By contrast, Congress explicitly intended the Civil Rights Remedy to correct state-sponsored discrimination in state justice systems, see, *e.g.*, Brzonkala Br. 13-17, 45-48, and crafted particular provisions directly addressing those violations. See, *e.g.*, 42 U.S.C. § 13981(e)(2) (permitting suits whether or not there was a criminal complaint, prosecution, or conviction, in response to congressional findings that States' discriminatory practices lead to low rates of reporting, prosecution and conviction

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[12] Indeed, the Court subsequently upheld 18 U.S.C. § 241, the modern-day version of the law struck in *Harris*, which authorizes prosecutions for private conspiracies that violate civil rights, *United States v. Guest*, 383 U.S. 745 (1966), as well as 42 U.S.C. 1985(3), the civil counterpart to the criminal law struck in *Harris*, which tracks the older criminal provision's precise language, and which authorizes a private cause of action for conspiracies to violate civil rights. *Griffin*, 403 U.S. 83 (1971).

of gender-based crimes). Unlike the earlier statutes, the Remedy is responsive and tailored to the state-justice system bias with which Congress was concerned. Indeed, it is explicitly inapplicable to the "random" acts of violence found problematic in *Harris* because it is statutorily limited to cases in which the violence was gender motivated. *Id.* § 13981(e)(1).[13]

Finally, Respondents seem blindered to cases far more recent than *Harris* and the *Civil Rights Cases*, which squarely endorse Congress' authority to regulate private conduct under Section 5 under appropriate circumstances. Rather, Respondents defer solely to the court of appeals' decision, see Morrison Br. 43, which dismissed that recent authority, including a unanimous Court in *District of Columbia* v. *Carter*, 409 U.S. 418, 423 n.8 (1973), and six Justices in *Guest*, 383 U.S. at 762 (Clark, J, concurring); *id.* at 782 (Brennan, J., dissenting). The Court here need not reach the precise issue addressed in those cases, whether Congress may regulate purely private conduct with no connection to state action, because Congress here found sufficient discriminatory state action to warrant Section 5 legislation. Nonetheless, as just one example of the lower court's misguided reasoning, the court of appeals dismissed *District of Columbia* because it cited *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966), on the basis that *Morgan* had endorsed a substantive theory of Section 5 authority that this Court in *Boerne* subsequently rejected. Pet. App. 140a-141a. But *District of Columbia* did not cite

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[13] Respondents' reliance on the legislative history of the statutes rejected in *Harris* and the *Civil Rights Cases* leads to no different result. *See* Morrison Br. 37-41; Crawford Br. 36-37. That the statutes in *Harris* and the *Civil Rights Cases* were deemed insufficiently connected to state action to warrant Section 5 legislation does not control the result in this case, which involves a markedly distinct statute.

Morgan for that theory, and the Court recently cited *Morgan* with approval. See *Boerne*, 521 U.S. at 518.

In sum, Respondents' arguments fail to undermine the record here, in which Congress carefully crafted a narrow remedy tailored to redress equal protection violations that deny victims of gender-based violence meaningful access to justice.

CONCLUSION

The opinion of the Fourth Circuit should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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Nos. 99-5 and 99-29

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ANTONIO J. MORRISON, ET AL.

CHRISTY BRZONKALA, PETITIONER

v.

ANTONIO J. MORRISON, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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Respondents do not dispute that violence against women is an immense national problem to which the States have failed adequately to respond. Nor do they dispute that violence against women takes a substantial toll on the national economy and interstate commerce, such as by preventing women from obtaining and retaining jobs, traveling, and engaging in all manner of economic activity. They also acknowledge that Congress's findings on those matters are entitled to considerable deference.

Yet, respondents insist that Congress is powerless to provide victims of gender-motivated violence a civil damages remedy against their assailants, notwithstanding that the remedy is narrowly tailored to vindicate victims' civil rights, does not target state officials or intrude into state functions, and does not expand or contract whatever tort remedies may be available to victims under state law. Indeed, respondents suggest that the very narrowness and unobtrusiveness of the remedy undermine its constitutionality, ignoring the well-established rule that Congress may choose to address a problem one step at a time. Respondents are mistaken.

A. Section 13981 Is An Appropriate Exercise Of Congress's Power Under The Commerce Clause

Respondents contend that 42 U.S.C. 13981, the civil remedy provision of the Violence Against Women Act of 1994, exceeds Congress's authority under the Commerce Clause for essentially three reasons: first, because violence against women is not an inherently commercial or economic activity; second, because the nexus between gender-motivated violence and interstate commerce is, in respondents' view, as attenuated as the nexus between gun possession near schools and interstate commerce in *United States* v. *Lopez*, 514 U.S. 549 (1995); and, third, because respondents perceive no limiting principle that would enable the Court to uphold Section 13981 but to strike down other statutes as

exceeding Congress's commerce power. None of those contentions is valid.

This Court has repeatedly declined to impose formalistic tests of what activities may be regulated by Congress under the Commerce Clause. So long as an activity, even if neither commercial nor interstate, substantially affects interstate commerce, the activity is not automatically immune from regulation under the Commerce Clause, as respondents suggest. Such a rule would leave Congress unable to address evils that, although not themselves commercial, pose a significant threat to interstate commerce.

As the majority and concurring opinions in *Lopez* suggest, when Congress has invoked its commerce power to regulate activity that is neither inherently commercial or economic nor connected to a legislative program to regulate or protect a market, the Court may subject the regulation to additional scrutiny to assure that a proper distinction between the national and the purely local spheres of authority is maintained. The Court may thus consider whether the connection between the regulated activity and interstate commerce is unduly attenuated. The concurring opinion suggests that in such instances the Court should also consider whether the regulation intrudes into an area of traditional state concern (and, if so, whether it interferes with state authority in a manner that is excessive given the strength of the national objective). Section 13981, unlike the statute at issue in *Lopez*, satisfies those additional tests.

1. Congress's power to regulate intrastate activities that substantially affect interstate commerce is not confined to the regulation of those activities that are themselves inherently commercial or economic in nature. This Court has never so stated.[1] Indeed, the Court has indicated that

[1] Cf. *Wickard* v. *Filburn*, 317 U.S. 111, 125 (1942) ("[E]ven if appellee's activity be local and *though it may not be regarded as commerce*, it may still, *whatever its nature*, be reached by Congress if it exerts a substantial economic effect on interstate commerce.") (emphases added).

Congress may regulate non-commercial activities as part of a legislative program to regulate or protect a market. See *Lopez*, 514 U.S. at 561.[2] Nor would the restriction proposed by respondents bear any relation to the purpose of the commerce power, given that interstate commerce may be substantially affected, indeed obstructed, by activities that are not themselves commercial.

In *Lopez*, the Court found that the activity regulated by the Gun-Free School Zones Act of 1990 (GFSZA) "has nothing to do with 'commerce' or any sort of economic enterprise," 514 U.S. at 561, but the Court did not treat that finding as dispositive. Instead, the Court proceeded to consider whether that non-commercial activity had the requisite effect on, and nexus to, interstate commerce. *Id.* at 562-568. Justice Kennedy's concurrence, which Justice O'Connor joined, suggests that Congress might exercise its commerce power even in situations where "neither the actors nor their

[2] The lower courts have thus consistently held that Congress may prohibit interference with access to medical facilities in order to protect the market for their services, and may prohibit possession of controlled substances or weapons as part of a comprehensive regulation of the market in those products. See, *e.g.*, *Hoffman* v. *Hunt*, 126 F.3d 575, 582-588 (4th Cir. 1997) (upholding Freedom of Access to Clinic Entrances Act against Commerce Clause challenge), cert. denied, 523 U.S. 1136 (1998); *Terry* v. *Reno*, 101 F.3d 1412, 1418-1420 (D.C. Cir. 1996) (same), cert. denied, 520 U.S. 1264 (1997); see also, *e.g.*, *Proyect* v. *United States*, 101 F.3d 11 (2d Cir. 1996) (per curiam) (upholding statute prohibiting, *inter alia*, possession of controlled substances and manufacture of controlled substances for personal use against Commerce Clause challenge); *United States* v. *Leshuk*, 65 F.3d 1105, 1111-1112 (4th Cir. 1995) (same); see also, *e.g.*, *United States* v. *Franklyn*, 157 F.3d 90, 93-96 (2d Cir.) (upholding statute prohibiting possession of machine guns against Commerce Clause challenge), cert. denied, 525 U.S. 1027 (1998); *United States* v. *Kenney*, 91 F.3d 884 (7th Cir. 1996) (same).

conduct has a commercial character, and neither the purposes nor the design of the statute has an evident commercial nexus," provided that Congress does not thereby "upset[] the federal balance." *Id.* at 580.

Respondents' proposed distinction between commercial and non-commercial activities would disable Congress from using its commerce power to protect commerce. It would preclude Congress from exercising that power to regulate *any* intrastate non-commercial activity, no matter how immediate, direct, and substantial a threat that activity may pose to the national economy and interstate commerce. Cf. *National Organization for Women, Inc.* v. *Scheidler*, 510 U.S. 249, 258 (1994) (recognizing that "[a]n enterprise surely can have a detrimental influence on interstate or foreign commerce without having its own profit-seeking motives"). The Framers could not have intended to leave Congress impotent to protect the Nation against such threats. Few would doubt, for example, that Congress may prohibit private possession of nuclear, biological, or chemical weapons, or tanks, artillery pieces, or hand grenades, although mere possession of those articles may not be "commercial," as the Court used the term in *Lopez*.

To take another example, Congress has long exercised its commerce power to require the adoption and observance of an official standard of time throughout the Nation. See 15 U.S.C. 260 *et seq.*; see also *Allied Theatre Owners, Inc.* v. *Volpe*, 426 F.2d 1002 (7th Cir.), cert. denied, 400 U.S. 941 (1970). The activity of setting a clock or a watch is not inherently commercial. Yet, if Congress could not establish clear and consistent rules governing time, interstate commerce would be significantly burdened.

This Court has learned from experience that "mathematical or rigid formulas" are unworkable in assessing the reach of Congress's authority under the Commerce Clause. *Wickard* v. *Filburn*, 317 U.S. 111, 123 n.24 (1942) (quoted in

Lopez, 514 U.S. at 573 (Kennedy, J., concurring)); see also *Lopez*, 514 U.S. at 567 (recognizing that there cannot be "precise formulations" of the extent of the commerce power). It should reject respondents' invitation to adopt such a formula in this case.

2. Section 13981 satisfies the standard articulated by this Court for determining whether intrastate activity may be regulated under the Commerce Clause, *i.e.*, whether the activity "exerts a substantial economic effect on interstate commerce" that is not unduly attenuated. *Lopez*, 514 U.S. at 556 (quoting *Wickard*, 317 U.S. at 125).

First, Section 13981, in contrast to the GFSZA in *Lopez*, rests on extensive congressional findings explicating the relationship between gender-motivated violence and interstate commerce. See H.R. Conf. Rep. No. 711, 103d Cong., 2d Sess. 385 (1994) (H.R. Conf. Rep.); U.S. Br. 5 (quoting relevant findings). Those findings are supported by a massive legislative record, compiled over four years of hearings, which document the impact of violence against women on the national economy and interstate commerce.[3] No legislative record of any sort was compiled with respect to the GFSZA. The conclusory "findings" in support of that statute were made by a subsequent Congress, and thus were not relied on by the United States in defending the statute or considered by the Court in evaluating it. See *Lopez*, 514 U.S. at 562-563

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[3] As respondents note (Morrison Br. 24), while Congress's findings address the impact on interstate commerce of gender-motivated violence, much of the evidence in the legislative record concerns the impact of rape, domestic abuse, and other violence that primarily affects women, whether or not motivated by gender animus. It was reasonable for Congress to conclude from the record that gender-motivated violence alone is sufficiently widespread to impose a substantial burden on interstate commerce. Congress should not be precluded from focusing on this particularly egregious species of violence against women by the shortage of studies isolating its economic impact.

& n.4. Consequently, unlike in *Lopez*, the Court need not "pile inference upon inference" to attempt to discern a nexus between the regulated activity and interstate commerce. *Id.* at 567. Congress has clearly articulated that nexus; nothing therefore need be inferred by the Court.[4]

Second, unlike the GFSZA, Section 13981 regulates an activity that has a direct, immediate, and substantial relationship to interstate commerce. In *Lopez*, the Court would have had to conclude that the possession of guns in school zones (1) might lead to violent crime, (2) which might affect the learning process, (3) which might produce less-productive citizens some years in the future, (4) which might ultimately impair the national economy. See 514 U.S. at 563-564 (describing the government's argument); *id.* at 565 (describing the dissent's argument). And the Court would have had to assume that the educational system, an independent actor under the authority of the States, would fail to compensate for whatever adverse effects on the learning process might be attributable to gun possession in school zones.

No such attenuated chain of causation is necessary to sustain Section 13981. As Congress found, violence against women has a direct impact on interstate commerce by,

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[4] Respondents observe (Morrison Br. 3) that some parties, including the Department of Justice, expressed concerns about Congress's authority under the Fourteenth Amendment to enact earlier versions of Section 13981. In response to those concerns, Congress undertook an extensive analysis of whether a civil remedy could be justified under the Commerce Clause as well as the Fourteenth Amendment. That analysis produced the findings discussed in the text. Neither of the Department of Justice letters cited by respondents addresses the possibility of a Commerce Clause basis for the statute. Nor do the letters address the findings and the rationale subsequently articulated by Congress to justify the statute under the Fourteenth Amendment—namely, that the statute is an appropriate exercise of Congress's power under Section 5 to remedy pervasive denials of equal protection in state justice systems.

among other things, preventing victims from working in the national economy, deterring victims and potential victims from seeking higher-paying jobs, traveling interstate, and engaging in other economic activity, and imposing higher medical costs on victims, employers, insurers, and governments. See U.S. Br. 23-27.

For example, as the evidence before Congress demonstrated, women do not seek jobs that would require them to work at night, out of a reasonable fear that they will be subjected to violence because they are women. The evidence also demonstrated that women who are, in fact, raped or battered often cannot work, or work productively, for weeks or even months afterward. And 6000 women are raped or battered each day in this country. See U.S. Br. 6-7, 23-24 (describing evidence). There is nothing at all remote or speculative about the connection between this conduct and interstate commerce.

Third, unlike the GFSZA, Section 13981 seeks to remedy not some generalized and randomly distributed impact on commerce, but rather the particularized distortion of commerce that is caused by invidious discrimination against a discrete group. Such distortion causes individuals' economic decisions—such as where to work, where to travel, and where to shop—to be determined by immutable characteristics, such as sex or race, and thereby transforms the character of commerce for an entire sector of the population. See *Katzenbach* v. *McClung*, 379 U.S. 294, 300 (1964); *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241, 253 (1964).

Indeed, Section 13981 can properly be viewed as part of the framework of laws enacted by Congress that serve to remove barriers to women's equal participation in the marketplace and thereby to correct the distortion of interstate commerce caused by sex discrimination. See, *e.g.*, 42 U.S.C. 2000e-2(a) and (b) (prohibiting employment discrimination "because of [an] individual's * * * sex" or "on the basis of

* * * sex"); 42 U.S.C. 2000e(k) (defining "because of sex" and "on the basis of sex" to include "because of or on the basis of pregnancy, childbirth, or related medical conditions"); 29 U.S.C. 206(d) (requiring equal pay for women). See also H.R. Conf. Rep. 385 (recognizing relationship between Section 13981 and Title VII); S. Rep. No. 138, 103d Cong., 1st Sess. 48, 54 (1993) (1993 S. Rep.) (same).

3. Justice Kennedy's concurrence in *Lopez* suggests that, when Congress addresses an intrastate activity that is neither itself economic or commercial in nature nor connected to a congressional program to regulate or protect a market, the Commerce Clause inquiry may not be satisfied merely by the fact that the activity substantially affects interstate commerce. It may also be necessary in such circumstances "at the least [to] inquire whether the exercise of national power seeks to intrude upon an area of traditional state concern." 514 U.S. at 580.[5] That inquiry is satisfied with respect to Section 13981 by three federalism-based considerations: Section 13981 addresses the historically federal concern of civil rights, it avoids undue encroachment into areas of traditional state authority, and it responds to a documented state failure to address a national problem that poses a substantial threat to interstate commerce.[6]

First, Section 13981 singles out those acts of violence that are "due, at least in part, to an animus based on the victim's gender." 42 U.S.C. 13981(d)(1). It thereby seeks to provide a remedy for a violation of civil rights, an area of historically federal concern, which serves interests distinct from those of state tort law. As the final Senate Judiciary Committee Report on Section 13981 explained, "[w]hile traditional criminal charges and personal injury suits focus on the harm to the individual, a civil rights claim redresses an assault on a commonly shared ideal of equality." 1993 S. Rep. 51; see *Griffin* v. *Breckenridge*, 403 U.S. 88, 101-102 (1971) (recognizing that a requirement that the defendant acted with discriminatory animus distinguishes a civil rights remedy from a general tort remedy).

Second, Section 13981 does not operate against the States, does not displace any state law, and does not implicate the peculiarly "sensitive relation between federal and state criminal jurisdiction." *Lopez*, 514 U.S. at 561 n.3. Section 13981 simply creates a private right of action, which enables

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[5] An inquiry into whether a statute "seeks to intrude upon an area of traditional state concern," *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring), does not, under this Court's jurisprudence in such areas as preemption, equate with an inquiry into whether a statute of general applicability incidentally affects an area of traditional state concern. A general federal prohibition of private possession of weapons of mass destruction, for example, would incidentally affect state parks, state schools, and state office buildings, as well as businesses, residences, and all other property within a State. But that is not the sort of "intrusion" that was at issue in *Lopez*, which involved a statute that prohibited gun possession only in or near schools. See generally *United States* v. *Oregon*, 366 U.S. 643, 648-649 (1961) (federal statute properly directed to an area of legitimate congressional concern was not invalid even though it "pertains to the devolution of property," a subject otherwise controlled by state law); *Kolovrat* v. *Oregon*, 366 U.S. 187, 197-198 (1961) (state law controlling devolution of property must accommodate federal treaty rights); *Hauenstein* v. *Lynham*, 100 U.S. 483, 488-490 (1880) (same).

[6] Respondents suggest (Morrison Br. 29) that such considerations cannot help to define the limits of the commerce power because "they have nothing to do with 'commerce among the states.'" Respondents are mistaken. For example, in determining what effects on commerce are sufficiently substantial to justify federal regulation, one consideration has historically been whether the regulation is civil rights legislation that seeks to remove barriers that restrict the participation of a discrete group in commerce. See pp. 7-8, *supra*. Respondent Morrison's suggestion that the commerce power does not admit of federalism-based limitations is further belied by his own acknowledgment of such limitations. See Morrison Br. 29 n.10 (observing that "the commerce power is plenary where it is regulating private conduct and acting properly within that power").

victims of gender-motivated violence to seek damages and other relief against their assailants, as an alternative to whatever remedies may be available to them under state tort law.[7] And Section 13981 expressly bars supplemental federal jurisdiction over state-law claims involving such matters as divorce, alimony, and child custody. 42 U.S.C. 13981(e)(4). The care that Congress exercised in preserving the States' authority over matters of criminal and family law, as well as over general tort law, confirms that Section 13981 was not designed to "upset[] the federal balance to a degree that renders it an unconstitutional assertion of the commerce power." *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring).

Third, Section 13981 was enacted in response to the States' sustained failure to deal effectively with the problem of violence against women—a failure that was thoroughly documented in the evidence before Congress, including a decade of state task force reports on gender bias in state justice systems, and that was acknowledged by the vast majority of state attorneys general. As that evidence demonstrated, despite the existence of state criminal laws and state tort remedies capable of reaching most acts of violence against women, many police, prosecutors, judges,

[7] A cause of action under Section 13981 and a cause of action under state tort law are subject to different substantive, procedural, and evidentiary requirements. Some of the requirements of a Section 13981 action, such as the unavailability of interspousal immunity and the availability of attorneys' fees, may be more favorable to the plaintiff; other requirements, such as the necessity to prove that the conduct at issue constituted a crime of violence and was motivated by gender animus, may be less favorable to the plaintiff. The existence of such differences does not, as respondents assert (Crawford Br. 29-34), cause Section 13981 to "displace" state tort law. Such displacement would occur only if Section 13981 preempted state law or dictated the requirements that must be met in a cause of action under state law. Section 13981 does neither.

and other state actors continued to treat rape, domestic abuse, and similar crimes that primarily affect women less seriously than other violent crimes. See U.S. Br. 7-11, 35-36, 38-42 (describing such evidence).[8] For their part, the States advised Congress that the problem required a national solution, including a federal right of action for victims of gender-motivated violence. See *Crimes of Violence Motivated by Gender: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 103d Cong., 1st Sess. 34-36 (1993) (letter of 38 state attorneys general). At least in such extraordinary circumstances, where there is an essentially undisputed record of prolonged state inability to remedy a problem that imposes a substantial burden on interstate commerce, federalism concerns should not require Congress to withhold a remedy while the problem and its consequences persist.

To be sure, the Framers of our Constitution sought to divide the powers of the national government and the state governments, so that each would serve as a check on abuses by the other and thereby protect the rights of the people. But the Framers also sought to create a strong central government, correcting what they perceived to be the

[8] Respondents mistakenly suggest (Morrison Br. 2) that 28 U.S.C. 1445(d), which provides that a Section 13981 action cannot be removed from state court to federal court, casts doubt on Congress's intent "to respond to 'systemic' bias in state courts." In providing for concurrent jurisdiction in federal and state court over Section 13981 actions, see 42 U.S.C. 13981(e)(3), Congress sought to enable victims of gender-motivated violence to choose the more appropriate forum, which in some cases might be a convenient state courthouse rather than a distant federal courthouse. Congress sought in 28 U.S.C. 1445(d) to prevent defendants from nullifying that choice of forum. Congress did not, of course, find that all, or even most, state judges or other state actors do not deal fairly with rape, domestic abuse, and other crimes of violence that primarily affect women. Nor need Congress have made such a finding in order for Section 13981 to be sustained.

weakness of the central government under the Articles of Confederation, including its inability to address national concerns. See generally *New York* v. *United States*, 505 U.S. 144, 163 (1992); *FERC* v. *Mississippi*, 456 U.S. 742, 791 (1982) (O'Connor, J., concurring and dissenting); *Wesberry* v. *Sanders*, 376 U.S. 1, 9-10 (1964). It is consistent with the Framers' intent to construe the commerce power in a manner that does not leave the national government powerless to deal with a substantial threat to interstate commerce (and to the rights of a significant segment of the population) that the States have been unable to deal with on their own.[9]

B. Section 13981 Is An Appropriate Exercise Of Congress's Power Under The Enforcement Clause Of The Fourteenth Amendment

We have explained (U.S. Br. 36-49) that Section 13981 may also be upheld as an exercise of Congress's "power to enforce, by appropriate legislation, the provisions of" the Fourteenth Amendment, including its guarantee of equal protection of the laws. U.S. Const. Amend. XIV, § 5. Section 13981 serves to "enforce" women's right to equal protection of the laws against crimes of violence—a right that Congress found had often been denied women in state justice systems as a result of the prejudices of police officers, prosecutors, judges, and other state actors.

Respondents counter that Section 13981 is not a permissible exercise of Congress's power under Section 5 of the Fourteenth Amendment for four reasons: first, because Section 13981 does not, in respondents' view, "enforce" equal protection rights; second, because Section 13981, like the statutes in *United States* v. *Harris*, 106 U.S. 629 (1883), and the *Civil Rights Cases*, 109 U.S. 3 (1883), provides a right of

[9] Of course, overlapping exercise of regulatory authority is consistent with our system of federalism, as shown by such familiar examples as the coexistence of federal and state antitrust laws.

action against private individuals; third, because Section 13981 is not, according to respondents, "congruent and proportional" to the constitutional violations that Congress identified; and fourth, because Section 13981 could not be upheld without granting Congress an unlimited general police power. Respondents are again mistaken on all counts.

1. Respondents contend (Morrison Br. 36) that Section 13981 "does not 'enforce' any citizen's right to equal treatment" because Section 13981 does not directly "prohibit or deter states or state officials from doing anything." This Court has not viewed Congress's enforcement power under Section 5 so restrictively. To the contrary, the Court has recognized that Congress has broad discretion under Section 5 to adopt "[w]hatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view." *City of Boerne* v. *Flores*, 521 U.S. 507, 517 (1997) (quoting *Ex parte Virginia*, 100 U.S. 339, 345-346 (1880)). It is necessary only that the legislation in some manner "deters or remedies constitutional violations." *Id.* at 518.

Section 13981 "deters or remedies," in multiple ways, the equal protection violations that Congress identified, *i.e.*, the failure of state justice systems to treat rape, domestic abuse, and other crimes that primarily affect women as seriously as they do other violent crimes. See 1993 S. Rep. 42, 49. First, Section 13981 provides an alternative to the state justice system in which to obtain vindication and redress. Accordingly, even if a state police officer, a state prosecutor, or a state judge has wrongly disregarded a woman's complaint of gender-motivated violence (*e.g.*, because of what the Senate Judiciary Committee described as "archaic prejudices" that have caused "those within the justice system" to "blame women for the beatings and the rapes they suffer," 1993 S. Rep. 38), the woman still has an opportunity to have her complaint validated by a federal judge and a federal jury through a process that "the survivor, not the State, con-

trols." S. Rep. No. 545, 101st Cong., 2d Sess. 42 (1990) (1990 S. Rep.). Section 13981 thereby prevents the complete denial of equal protection that Congress found would too often occur if a victim could look only to the state justice system for vindication and redress. And, in the event that a victim who was treated unfairly by the state justice system prevails on a Section 13981 claim, state actors may well be persuaded to give more careful consideration to her complaint and the complaints of similar victims.

Congress also intended that Section 13981 would more broadly deter and remedy violations of equal protection in state justice systems by "send[ing] a powerful message that violence due to gender bias affronts an ideal of equality shared by the entire Nation." 1993 S. Rep. 44; see 1990 S. Rep. 41 (Section 13981 "makes a national commitment to condemn crimes motivated by gender"). Congress contemplated that the message would be heard by police, prosecutors, judges, and other state actors, thereby combating the common "misconception that crimes against women are second-class crimes." 1993 S. Rep. 42; see *Violence Against Women—Victims of the System: Hearing Before the Senate Comm. on the Judiciary*, 102d Cong., 1st Sess. 125 (1991) (testimony of chair of Florida Supreme Court Gender Bias Study Implementation Commission that a federal civil remedy such as Section 13981 would "increase the responsiveness of the states").

2. Respondents contend (Morrison Br. 37-39) that Section 13981 is undermined by *Harris* and the *Civil Rights Cases*, which respondents construe as "reject[ing] Section 5 of the Fourteenth Amendment as a basis for reaching private conduct." As we previously explained (U.S. Br. 46-48), the Court's holdings in those cases are more limited—*i.e.*, that Congress cannot legislate under Section 5 on the theory that the Equal Protection Clause may be violated by purely private conduct unconnected to state action. Such an

understanding is confirmed by the Court's explanation in the *Civil Rights Cases* that the statute at issue—which established a right to be free of private discrimination in places of public accommodation—did "not profess to be corrective of any constitutional wrong committed by the States." 109 U.S. at 14; see *ibid.* (noting that the statute established "rules for the conduct of individuals in society towards each other, * * * without referring in any manner to any supposed action of the State or its authorities"); see also *Harris*, 106 U.S. at 640 ("the section of the law under consideration is directed exclusively against the action of private persons, without reference to the laws of the State or their administration by her officers").[10]

Section 13981, in contrast, *does* "profess to be corrective of [a] constitutional wrong committed by the States," a denial of equal protection in state justice systems to victims of gender-motivated violence. As the Conference Report explains, Section 13981 was designed to remedy "existing bias and discrimination in the criminal justice system," which "often deprive[] victims of crimes of violence motivated by gender of equal protection of the laws and the redress to which they are entitled." H.R. Conf. Rep. 385; see also 1993 S. Rep. 55 (explaining that Section 13981 was designed to "rectify the biases" of state law and practice, which were depriving women of the "equal protection of the laws * * * in the classic sense"). It is not inconsistent with the holdings of *Harris* and the *Civil Rights Cases*—much less with the text of the Fourteenth Amendment—to permit Congress to

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[10] It is irrelevant that, as respondents note (Morrison Br. 37-39), some members of Congress observed during the debates on the statutes in *Harris* and the *Civil Rights Cases* that some States were not enforcing their own laws evenhandedly. That does not mean that those statutes were designed, in the view of either Congress or the Court, to deter or remedy constitutional violations by the States. No such design is evident in the text of those statutes.

reach private conduct as a means of preventing and remedying state violations of equal protection.

3. Respondents further argue (Morrison Br. 43) that Section 13981 is not a "congruent and proportional" remedy for either of two reasons: first, that the legislative record does not, in respondents' view, contain evidence of widespread violations of equal protection (*id.* at 44-47) and, second, that Section 13981 may not apply in some situations in which equal protection violations have occurred and may apply in some situations in which equal protection violations have not occurred (*id.* at 47-48).

a. Respondents are simply wrong in suggesting (Morrison Br. 44-45) that the legislative record contains only isolated or "anecdotal" evidence of state violations of equal protection. Respondents ignore the more than 20 state task force reports, cited repeatedly in the congressional committee reports on Section 13981, that exhaustively investigated gender bias in state justice systems.[11] Those reports consistently found that violent crimes that primarily affect women, such as rape and domestic abuse, are treated less seriously by state justice systems than are other violent crimes. And the reports attributed that disparity, in significant part, to the "prejudices," "biases," and "stereotypes" harbored by police, prosecutors, judges, and other state actors. See S. Rep. No. 197, 102d Cong., 1st Sess. 43-44 (1991) (1991 S. Rep.); see also U.S. Br. 7-11, 38-41 & nn.20, 21

[11] The state task forces were composed of "appellate and trial judges, lawyers, bar leaders, law professors, court administrators judicial educators, legislators, community leaders, and social scientists." Lynn H. Schafran, *Overwhelming Evidence: Reports on Gender Bias in the Courts*, Trial 28 (Feb. 1990) (cited in S. Rep. No. 197, 102d Cong., 1st Sess. 43-44 (1991)). The task forces "employ[ed] a wide range of data-collection methods," including public hearings, interviews with judges, lawyers, and litigants, reviews of transcripts and written decisions, empirical studies, and surveys of judges, lawyers, and court personnel. *Ibid.*

(citing evidence of bias from state task force reports and other materials before Congress); Brzonkala Br. 13-17; Amici Br. of Law Professors 18-23. Respondents do not, and cannot, dispute that purposeful state action that disadvantages a particular group because of such inaccurate stereotypes violates the Equal Protection Clause. See, *e.g.*, *United States* v. *Virginia*, 518 U.S. 515, 532-534 (1996); *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985).[12]

Respondents fail to recognize, moreover, the "wide latitude" that is accorded Congress in identifying conduct that may violate equal protection. *Flores*, 521 U.S. at 520, 535. Congress is not required to observe the same constraints as would a court with respect to, for example, evidentiary rules, burdens of proof, and the need to base its conclusions solely on the record of the case before it. See *Fullilove* v. *Klutznick*, 448 U.S. 448, 502-503 (1980) (Powell, J., concurring) (Congress, unlike the courts, "has no responsibility to confine its vision to the facts and evidence adduced by particular parties," but may "consider all facts and opinions that may be relevant to the resolution of an issue"). Congress is thus not restricted to addressing particular conduct that the courts have already determined to be constitutionally discriminatory.[13]

[12] As respondents note (Morrison Br. 45), some victims of gender-motivated violence are men, although Congress assumed that the number was relatively small. But that fact does not undermine the conclusion that women have often been denied equal protection of the laws in state justice systems and that Section 13981 is an appropriate remedy for those violations.

[13] As we noted (U.S. Br. 41), however, several federal courts had recognized by the time that Section 13981 was enacted that state actors' failure to treat domestic violence as seriously as other violence may constitute an equal protection violation. Respondents erroneously claim (Morrison Br. 46) that "[n]ot one of these cases found a sex-discriminatory policy after trial." In fact, after the decision denying the municipality's

In sum, the legislative record in this case amply establishes the existence of widespread violations of equal protection in state justice systems. This case thus stands in stark contrast to the cases on which respondents rely, *Flores* and *Florida Prepaid Postsecondary Education Expense Board* v. *College Savings Bank*, 119 S. Ct. 2199 (1999), where the legislative record revealed no pattern of constitutional violations.

b. Respondents also complain (Morrison Br. 47-48) that Section 13981 is overinclusive, underinclusive, or both. But this Court has never required a precise fit between the constitutional violations identified by Congress and the remedy provided by Congress under Section 5 of the Fourteenth Amendment.

As for respondents' contention that Section 13981 is not limited to States in which equal protection violations have occurred (Morrison Br. 47), this Court has recognized that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional." *Flores*, 521 U.S. at 518; accord, *e.g.*, *Katzenbach* v. *Morgan*, 384 U.S. 641, 651 (1966); *South Carolina* v. *Katzenbach*, 383 U.S. 301, 308 (1966). Moreover, given the evidence before Congress documenting the disparate treatment of crimes primarily affecting women in virtually every State that had studied the subject, Congress could reasonably conclude that the threat of equal protection violations existed throughout the Nation. See 1991 S. Rep. 43 (noting that "[s]tudy after study commissioned by the highest courts of the States—from Florida to New York, California to New Jersey, Nevada to Minnesota—has concluded that crimes disproportionately affecting women are often treated less seriously than comparable crimes against men").

motion to dismiss in one of those cases, *Thurman* v. *City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984), the jury found an equal protection violation and awarded damages of $2.3 million, and the plaintiff then agreed to settle the case for $1.9 million. See *Millions Awarded Beaten Wife Who Sued Connecticut Police*, Washington Post (June 26, 1985); see also *Batterers Win Another Round*, Boston Globe (May 13, 1998). Congress was well aware of the landmark *Thurman* case, as the plaintiff testified in support of the Violence Against Women Act. *Women and Violence: Hearings Before the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. 99 (1990) (testimony of Tracy Motuzick (formerly Thurman)); see *id.* at 88 (discussion of *Thurman* case by Chairman Biden).

As for respondents' complaint that Section 13981 does not reach all situations in which equal protection violations might occur, this Court has recognized that Congress is entitled to deal with a problem one step at a time. See *FCC* v. *Beach Communications, Inc.*, 508 U.S. 307, 316 (1993) (Congress "must be allowed leeway to approach a perceived problem incrementally."). And other provisions of the Violence Against Women Act, such as those that provide funds to educate state police, prosecutors, and judges on issues relating to rape and domestic violence, also respond to the equal protection violations that Congress identified. See 42 U.S.C. 3796gg(b)(1), 3796hh(b)(6).

c. As we have explained (U.S. Br. 49-50 & n.29), Section 13981, unlike the statutes invalidated in *Flores* and *Florida Prepaid*, is congruent and proportional to the constitutional violations that Congress identified. It does not seek to redefine the substantive prohibitions of the Fourteenth Amendment. It instead is designed to respond to an extensively documented record of constitutional violations, as defined under existing law, that Congress found to be frequent, ongoing, and widespread. It does so by providing a private civil remedy to victims of the very sorts of crimes that Congress found were treated in a discriminatory manner in state justice systems. And it does not operate against the State, interfere with state functions, or rewrite state law.

4. Finally, contrary to respondents' assertions (Morrison Br. 48), the Court would not be "grant[ing] Congress an unlimited general police power" by sustaining Section 13981 as an appropriate exercise of Congress's authority under Section 5 of the Fourteenth Amendment. As discussed above and in our opening brief (at 7-11, 38-41 & nn. 20, 21), Congress adopted Section 13981 only after compiling an extensive record of pervasive denials of equal protection in state justice systems—denials that were limited to crimes of rape, domestic abuse, and other violence that primarily affect women. There is no reason to believe that Congress could compile a similar record with respect to crimes generally.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

DECEMBER 1999

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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

-and-

CHRISTY BRZONKALA,

Petitioner,

v.

ANTONIO J. MORRISON, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Brief of *Amici Curiae* AYUDA, Inc., Asian & Pacific Islander American Health Forum, Asian/Pacific Islander Domestic Violence Resource Project, The National Association Of Women Lawyers, Project Esperanza, Refugee Women's Network, Inc., Sakhi For South Asian Women, Sanctuary For Families' Center For Battered Women's Legal Services, S.T.O.P.D.V., Inc., Asian Women's Shelter, Barrier Free Living, Daya Inc., Manavi, New York Asian Women's Center and Saheli in Support of Petitioners

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INTERESTS OF *AMICI CURIAE*

This brief *amici curiae* is submitted on behalf of AYUDA, Inc., the Asian & Pacific Islander American Health Forum, the Asian/Pacific Islander Domestic Violence Resource Project, The National Association of Women Lawyers, Project Esperanza, Refugee Women's Network, Inc., Sakhi for South Asian Women, Sanctuary for Families' Center for Battered Women's Legal Services, S.T.O.P.D.V., Inc., the Asian Women's Shelter, Barrier Free Living, Daya Inc., Manavi, the New York Asian Women's Center, and Saheli. These nonprofit educational organizations provide assistance to, and advocate for the rights of, women who are victims of gender-based domestic violence; most of these organizations have a particular focus on victims who are immigrants to this country. *Amici* have substantial knowledge of the national and local problem of gender-based violence, especially in the context of domestic relations, and of the particular impact of gender-based violence on immigrant women.[1]

Amici are vitally interested in this case because their clients' lives are directly, and often profoundly, affected by gender-motivated domestic violence, and by the inadequacy of state and local resources for protecting against and redressing such violence. *Amici* are concerned that the lower court's erroneous decision, if left undisturbed, would deprive their clients of a secure means of redress for -- and a

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[1] This brief was authored by the *amici* and counsel listed on its cover, and was not authored in whole or in part by counsel for a party. No one other than *amici* or their counsel made any monetary contributions to the preparation or submission of this brief. This brief is being filed with the written consents of all the parties, which have been filed with the Clerk.

probable source of deterrence against -- gender-motivated domestic violence.

STATEMENT OF THE CASE

In the interest of judicial economy, *amici* adopt the Statements of the Case contained in the briefs of the Petitioners.

SUMMARY OF THE ARGUMENT

Domestic violence is one of the most prevalent forms of gender-motivated violence. As Congress found in enacting the Violence Against Women Act (VAWA), the problem has tremendous effects on the national economy in terms of crime costs, workplace absenteeism, medical care costs, and losses such as emotional harm. Domestic violence also is gender-specific: nearly all of its victims are women, and the underlying motivations for it are gender-related.

One of the groups profoundly affected by domestic violence is immigrant women. Domestic violence against immigrant women is widespread, affecting women of all races, ethnicities, and socioeconomic classes in communities throughout the United States.

As is true with respect to domestic violence generally, domestic violence against immigrant women nearly always is based on gender animus. The problem of domestic violence against immigrant women is especially troubling because immigrant victims may face unique barriers to obtaining protection and redress, such as ignorance of legal rights and fear of deportation. These barriers often deter battered immigrant women from reporting abuse, reducing

the likelihood of securing criminal convictions of abusers. Immigrant women also frequently face discrimination and legal obstacles when they attempt to secure criminal or civil redress from state and local legal systems.

The problem of gender-motivated domestic violence against immigrant women is a subset of the devastating national problem of violence against women. VAWA seeks comprehensively to address the problem of violence against women, along with its particular effect on immigrant women. 42 U.S.C. § 13981 is a narrowly drawn, but essential, part of VAWA's statutory scheme.

Although § 13981 seeks to protect the civil right of all persons to be free from gender-motivated violence, the provision ameliorates some of the particular problems faced by battered immigrant women. For instance, § 13981 helps compensate for the barriers to reporting, along with the inadequacies of state and local resources for protection, by ensuring that battered immigrant women are provided with a means of obtaining civil redress from their abusers. Additionally, by declaring that all individuals have the right to be free from gender-motivated violence, § 13981 helps to ensure that battered immigrant women have knowledge of and confidence in the American legal system's ability to protect their right to be free from abuse in this country.

Section 13981 constitutionally responds to a problem having tremendous effects on interstate commerce, which state and local legal systems have failed adequately to address. Accordingly, this Court should reverse the lower court's decision, thereby ensuring that VAWA's comprehensive remedial structure is maintained, and that all victims of gender-motivated violence, including battered

immigrant women, receive the full panoply of VAWA's protections.

ARGUMENT

I. THE PROBLEM OF GENDER-MOTIVATED DOMESTIC VIOLENCE AGAINST IMMIGRANT WOMEN IS OF NATIONAL SCOPE AND CONSEQUENCE.

A. The Magnitude and Nature of the Problem

Domestic violence is one of the most common and pernicious forms of violence against women in this country. As Congress recognized in enacting VAWA, domestic violence harms millions of women across the United States, and costs the national economy billions of dollars annually in crime, medical care, employment, and other social costs.[2] Although domestic violence crosses race, ethnic, socioeconomic and geographical boundaries, it has a clear gender bias: approximately 95% of its victims are women, and the violence is motivated and perpetuated by perceptions of and biases against women.[3]

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[2] *See* S. Rep. No. 103-138, at 41 (1993) (finding that one million women annually seek medical attention as a result of domestic violence, and that society pays $5 billion to $10 billion per year in various costs associated with such violence).

[3] *See* H.R. Rep. No. 103-395, at 26 (1993); *see also* Julie Goldscheid, *Gender-Motivated Violence: Developing a Meaningful Paradigm for Civil Rights Enforcement*, 22 Harv. Women's L.J. 123, 147-48 (1999) (discussing the gender biases that often propel domestic violence against women).

One of the groups tremendously affected by domestic violence is immigrant women. Gender-motivated domestic violence against immigrant women affects communities of all nationalities in all regions of this country. The information that has been gathered on domestic violence against immigrant women demonstrates that the prevalence of such violence is disturbingly high. The magnitude and appalling nature of the problem also are illustrated by numerous individual stories and reports.

Surveys of immigrant populations in the United States indicate that domestic abuse of women is common. For example, a District of Columbia study, which was cited by Congress in enacting VAWA, found that the rate of domestic violence against Latina immigrants married to United States citizens or lawful permanent residents was 77%.[4] Another study reported that, in 1996, domestic violence organizations in the Washington, D.C. metropolitan area aided nearly 500 battered Asian immigrant women from virtually all ethnic Asian backgrounds.[5] Reports of immigrant spousal abuse to

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[4] *See* H.R. Rep. No. 103-395, at 26-27 (citing San Francisco Neighborhood Legal Assistance Foundation, Family Violence Prevention Fund, Asian Law Caucus, AYUDA, "Untold Stories: Cases Documenting Abuse by U.S. Citizens and Lawful Residents on Immigrant Spouses" (1993)); *see also* Leslye E. Orloff & Rachel Little, AYUDA, Inc., *Somewhere to Turn: Making Domestic Violence Services Accessible to Battered Immigrant Women* 7 (1999) (citing an AYUDA survey of immigrant women in which 62% of those questioned reported that they were subjected to weekly physical or emotional abuse).

[5] *See* Amita Bhandari Preisser, *Domestic Violence in South Asian Communities in America: Advocacy and Intervention*, 5 Violence Against Women 684, 688 (June 1999) (reporting findings of the Asian/Pacific Islander Domestic Violence Resource Project).

a Florida domestic violence organization more than doubled during the 1990s.[6] In Orange County, California, a single domestic violence program assisted 1,704 Asian and Latina domestic violence victims during fiscal year 1996-97.[7]

By far, the most telling evidence of the extent of gender-motivated domestic abuse against immigrant women comes from the stories of numerous individual victims from across the country. Researchers have gathered oral accounts illustrating the prevalence of domestic abuse in immigrant communities.[8] These accounts, along with news reports, demonstrate that such violence is widespread, and crosses ethnic and class boundaries.[9] For example:

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[6] Dan Moffett, *Counselors Help Immigrants Adjust to New Lifestyles*, Palm Beach Post, July 25, 1999, at 6A, *available in* 1999 WL 21273127.

[7] Tini Tran, *Asians, Latinos Now Find Refuge from Domestic Violence Services: Over the Last 10 Years, Everything from Treatment Programs to Court Services Have Been Modified to Address the Needs of Immigrants*, L.A. Times, May 4, 1998, at A3, *available in* 1999 WL 2424288.

[8] *See, e.g.*, Margaret Abraham, *Sexual Abuse in South Asian Immigrant Marriages*, 5 Violence Against Women 591 (June 1999) (using interviews of Asian Indian immigrant women to illustrate the extent of sexual abuse of women in that community).

[9] *See, e.g.*, Orloff & Little, *supra* note 4, at 9 ("Immigrant domestic violence victims come from many socio-economic levels. Not all battered immigrants are from lower socio-economic classes. Immigrant victims may be doctors, business owners, scientists, or child care providers. Perpetrators may be police officers, military personnel, sports heroes, diplomats, or college professors.").

- In Boston, a Haitian immigrant viciously beat his pregnant ex-girlfriend, also a Haitian immigrant, in what a prosecutor described was one of the "top five of the most brutal cases" of domestic violence she had seen;[10]
- In at least three cases in Texas and New York, Asian Indian immigrant men have poured gasoline on their wives or girlfriends and set them on fire, resulting in death in two of the cases;[11]
- In Salt Lake City, Olga,[12] a Russian immigrant, was beaten and threatened with knives by her husband for three years before escaping;[13]

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[10] Jack Sullivan, *Man Sentenced for Beating Pregnant Former Girlfriend*, Boston Herald, September 10, 1999, at 14, *available in* 1999 WL 3407650.

[11] *See* Raghu N. Singh & N. Prabha Unnithan, *Wife Burning: Cultural Cues for Lethal Violence Against Women Among Asian Indians in the United States*, 5 Violence Against Women 641, 646-49 (June 1999); Karen Freifeld, *Woman Recants in Abuse Case; Reverses Testimony that Man Burned Her*, Newsday (New York), July 27, 1999, at A4, *available in* 1999 WL 8182703 (reporting that burn victim recanted testimony that her boyfriend attempted to murder her by setting her on fire; noting that the recantation illustrates the difficulties associated with prosecution of domestic abuse).

[12] To protect privacy, many of the names of the women mentioned in this brief were changed by those who first reported their stories. This brief identifies victims only by their first names.

[13] Shawn Foster, *Law's Demise Puts Immigrant Wives at Risk; Non-Citizen Victims of Spousal Abuse May Lose Sources of Help; Immigrant Wives May Lose Key Sources of Help*, Salt Lake Trib., January 25, 1999, at B1, *available in* 1999 WL 3344058.

- An Asian immigrant living in Boston was given electric shocks and dragged around by her hair by her husband, a medical researcher;[14]

- In New Jersey, Jeffria, a Yugoslav immigrant, was punched, kicked, thrown against a table, and locked out of her home on winter nights, while her husband told her: "Nobody can help you. Not even God."[15]

Stories of these types abound in immigrant communities around the nation.[16]

As with domestic violence generally, domestic violence against immigrants is gender-specific. The evidence of the problem indicates that virtually all of its victims are women. Further, domestic violence against immigrant women may result from beliefs that domestic violence is an acceptable, or even sanctioned, form of violence against women.[17]

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[14] Hermione Malone, *Asian Task Force Encouraged by Drop in Domestic Abuse Deaths*, Boston Globe, September 25, 1999, at B3, *available in* 1999 WL 6083785.

[15] Juan Forero, *It's an INS First: Abused Wife Granted Residency*, The Star-Ledger (Newark, NJ), August 30, 1996, at 1, *available in* 1996 WL 11872231.

[16] Research and surveys also shed light on the sometimes distinctive nature of the domestic abuse suffered by immigrant women. *See* Orloff & Little, *supra* note 4, at 4-8 (discussing the various forms of physical and emotional abuse that are often exacted against immigrant women). For example, immigrant wives have been abused not just by their husbands, but also by their husbands' extended families, who may live in the same household or neighborhood. *See, e.g.*, Meeta Mehrotra, *The Social Construction of Wife Abuse: Experiences of Asian Indian Women in the United States*, 5 Violence Against Women 619, 627-28 (June 1999).

[17] *See, e.g.*, Abraham, *supra* note 8, at 591 (noting that, in many (Continued...)

B. The Barriers Faced by Abused Immigrant Women to Obtaining Protection and Redress

The problem of gender-based domestic violence against immigrant women also is particularly disturbing because of the unique barriers its victims face to obtaining protection and redress. The civil rights remedy afforded by § 13981 works to diminish many of these barriers.

First, many immigrant women lack knowledge of their legal rights, and of the processes that may be used to vindicate those rights. This ignorance often stems from the victim's experiences in her home country, in which domestic violence may have been treated merely as a non-criminal "private" matter.

Second, the threat of deportation causes many immigrant women to avoid seeking criminal redress against their abusers. Regardless of their actual immigration status, many immigrant women fear being deported either upon reporting abuse to police, or along with their husbands if their husbands are criminally convicted of domestic violence-related crimes.

Third, immigrant women frequently face economic obstacles to escaping their abusers. Economic deprivation is often used by abusers as a tool to control their partners' ability to leave the relationship. This can be especially

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cultures, sexual abuse of women within marriages "is often tolerated by institutions and by cultural beliefs that uphold the superior position of men, the sacredness of family, and women's socioeconomic dependency on men") (citation omitted).

crippling for abused immigrant women, who may lack critical support networks in this country.

Fourth, those immigrant victims who do pursue criminal or civil actions in state and local legal systems often face apathy or gender bias from police, prosecutors, and judges, making it difficult to obtain necessary protection and relief.

1. Ignorance of Legal Rights

One of the barriers frequently facing immigrant women victims of domestic violence is ignorance of their legal rights in this country, and of the processes that may be used to vindicate those rights. This lack of knowledge often stems from an assumption that domestic violence will be treated no differently in the United States than in the victim's home country:

> With limited acknowledgment of domestic violence in their own countries, battered immigrants may come to the United States unfamiliar with what legally available and socially acceptable recourse exists for victims. In some countries, domestic violence, while not only denied, may be found culturally acceptable. Other countries have only recently criminalized wife battering or violence against women. Only a few countries have programs or shelters to help abused women.[18]

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[18] Linda Kelly, *Stories from the Front: Seeking Refuge for Battered Immigrants in the Violence Against Women Act*, 92 Nw. U. L. Rev. 665, 682 (1998) (citations omitted); *see also* Orloff & Little, *supra* note 4, at 11-12 ("Most immigrant women, even those who have attained lawful permanent residency or become naturalized citizens, are afraid to use and do not understand how our legal system works."); Maurice Goldman, *The Violence Against Women Act: Meeting its Goal of*

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One horrific example of the consequence of this ignorance is the story of Phyllis, a West African woman whose husband had slapped, punched, and kicked her, raped her repeatedly, bitten her across the back and arms, choked her, thrown her down a staircase, and otherwise brutally abused her and their children. Because she was unaware of her rights in this country, Phyllis believed her husband, a court employee, when he warned that if she reported him or tried to leave, he would get court employees to testify that she was insane, and that her children should be taken away from her.[19] Phyllis endured the abuse for nine years, seeking help only after she discovered her husband had raped their five-year-old daughter.[20]

In another example from New York, a 23-year-old immigrant from Guyana suffered abuse and death threats from her husband for more than a year before finally reporting to authorities. She stated that, in Guyana, when she would report the abuse to police, they told her there was nothing they could do; her mother warned her that "it would be a waste of time here [in the United States] as well."[21]

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Protecting Battered Immigrant Women?, 37 Fam. & Conciliation Courts Rev. 375, 377 (1999) (noting that immigrant victims often misunderstand this country's common law system, under which oral testimony is not only valid, but is the primary form of evidence).

[19] Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 Yale J.L. & Feminism 3, 35-36 (1999).

[20] *Id.* at 36.

[21] Nancie L. Katz, *Shattering the Abuse Taboo: Immigrant Victims Counseled to Seek Aid*, New York Daily News, September 23, 1999, at 3, *available in* 1999 WL 23485546.

Section 13981 helps ameliorate the problem of ignorance of rights by declaring that "[a]ll persons within the United States shall have the right to be free from crimes of violence motivated by gender[.]" 42 U.S.C. § 13981(b). The civil remedy reinforces the concept that gender-based violence will not be tolerated, and that both civil and criminal remedies will be available to respond to such violence. This affirmation clearly informs all victims of gender-motivated violence, including battered immigrant women, of their right in this country to be free from such violence, and of the importance the American legal system has placed on that right.

2. Fear of Deportation or Loss of Child Custody

Regardless of their actual immigration status, many abused immigrant women avoid reporting gender-motivated domestic violence to criminal authorities out of a fear of deportation or loss of child custody.[22] Abusers frequently use the threat of deportation as a manipulative device to preclude reporting or escape; many victims believe in the threat's validity whether or not it has any basis in law.[23] The

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[22] *See* Orloff & Little, *supra* note 4, at 12-13. Many battered women are reluctant to report abuse when child custody is at issue. This reluctance stems from a belief that judges deciding child custody matters will view a battered woman as weak and unable to care for her children. *See* Kelly, *supra* note 18, at 677.

[23] *See* Orloff & Little, *supra* note 4, at 12. Often, the victim may be concerned that, if she is deported, she could be subjected to worse treatment in her home country than she experienced in the United States. *See, e.g.*, Lee J. Teran, *Barriers to Protection at Home and Abroad: Mexican Victims of Domestic Violence and the Violence Against Women Act*, 17 B.U. Int'l L.J. 1, 7 (1999) (positing that many battered immigrant women, including Mexicans, face considerable adversity if deported).

victim's perception may be reinforced by the fact that some abusers actually carry out their threats: when Soledad, a Peruvian immigrant, filed for divorce after enduring two years of abuse, her husband turned her passport in to INS officials.[24] Another woman's husband flagged down a Border Patrol car after an argument and demanded that the woman be deported; she was.[25]

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[24] Thomas Huang, *Nowhere to Run: Immigrant Women Can Face Added Barriers When Trying to Escape from Abusive Partners*, Dallas Morning News, August 20, 1998, at 1A, *available in* 1998 WL 13096381.

[25] Sarah Tully Tapia, *The Helpless Immigrants: Non-Citizen Victims Can Seek Residency On Their Own*, Arizona Daily Star, April 25, 1999, at 1A, *available in* 1999 WL 5717584. Before VAWA's passage, the threat of deportation was particularly grave for undocumented battered immigrant women. In one survey, 64% of the undocumented battered immigrants who responded stated that fear of deportation was their primary reason for failing to seek help. Orloff & Little, *supra* note 4, at 13 (citing Chris Hogeland & Karen Rosen, Coalition for Immigrant and Refugee Rights and Services, *Dreams Lost, Dreams Found: Undocumented Women in the Land of Opportunity* 63 (1991)). The "silence-or-departure" dilemma faced by undocumented women was created by immigration laws rendering undocumented spouses of citizens or lawful permanent residents dependent on their partners to sponsor them for lawful residency in this country. *See* Farhan Haq, *Aid for Battered Immigrant Women Slow in Coming*, Inter Press Service, March 19, 1996, *available in* 1996 WL 9809465; *see also, e.g.*, Kelly, *supra* note 18, at 667-71 (describing the history of the immigration laws giving control over the immigration process to abusive petitioning spouses); Goldman, *supra* note 18, at 378 ("Before the VAWA was signed, the abuser controlled the alien's legal status in the United States.").

VAWA provides undocumented battered immigrants with the right to "self-petition" for lawful residency without their partner's sponsorship, 8 U.S.C. § 1154(a)(1)(A)(iii), and requires the INS to consider "any credible evidence" in determining whether to grant such a

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A separate facet of this barrier frequently is the victim's fear that her non-citizen *abuser* will be deported if he is charged with and convicted of the abuse.[26] Deportation of the abuser may carry severe consequences for the victim, such as retaliation by the abuser against the victim's relatives in her home country.[27] Additionally, in some cases the victim's immigration status may be linked to her partner's, such that she could face deportation along with her abuser if he is convicted.[28] This dilemma may make

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petition. *Id.* § 1154(a)(1)(H). VAWA also permits battered immigrants to invoke a "cancellation of removal" defense in deportation proceedings. *Id.* § 1229b(b)(2) (Supp. III 1997).

[26] *See* Orloff & Little, *supra* note 4, at 206 (noting that abusers of immigrant battered women who are non-citizens can face deportation if convicted of domestic violence crimes); *see also* Cecelia M. Espenoza, *No Relief for the Weary: VAWA Relief Denied for Battered Immigrants Lost in the Intersection*, 83 Marq. L. Rev. 163, 176-77 (1999) (discussing domestic violence-related crimes for which conviction could result in deportation).

[27] *See* Orloff & Little, *supra* note 4, at 211-12 (advising advocates of battered immigrant women's rights to assess victims' fears of retaliation if their abusers are deported as a result of a criminal conviction).

[28] *See id.* at 190 (noting that, if a criminal prosecution of a non-citizen abuser proceeds before the victim qualifies for immigration relief under VAWA, the victim may lose her eligibility to file a self-petition under VAWA; "For this reason, it is very important for advocates and prosecutors [to] help battered immigrants make informed decisions about whether or not they wish to cooperate in the criminal prosecution of their abusers."); *see also* Espenoza, *supra* note 26, at 211 ("Informed immigrant women who may be ready to move out of abusive situations recognize that the institution of criminal proceedings may lead to deportation of the abuser, and if they are aware of the adverse
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pressing criminal charges against an abuser a practical impossibility for many immigrant women who suffer gender-motivated abuse.

These threats are diminished by the existence of § 13981, which allows immigrant victims of gender-motivated domestic violence to choose either criminal remedies or federal civil relief for the gender-based abuse they have suffered. Whereas victims may be fearful of seeking criminal relief that necessitates the use of law enforcement authorities, a civil remedy may allow victims to obtain the needed relief through a less threatening mechanism.

3. Economic Dependence on Abusers

Another hardship faced by many victims of gender-motivated domestic violence, including battered immigrant women, is complete economic dependence on their abusers. Economic deprivation frequently is used by abusive men as a tool to prevent their partners from escaping. In many abusive families, the abuser retains complete control over finances, thereby restricting the victim's overall independence. Lakshmi, for example, was unable even to buy candy without her husband's permission.[29] Although Mona worked in a high-paying job, her husband deposited her paychecks into his account.[30] Leticia, an immigrant from

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consequences on the abuser's status and their own relief, they do not seek intervention in the domestic violence.").

[29] Mehrotra, *supra* note 16, at 630.

[30] *Id.*

Mexico, was often left alone and penniless by her husband while he traveled on business trips; she was forced to beg for money on the street to feed herself and her young son.[31] Thu, a Vietnamese immigrant, was unable to escape her husband -- who raped her, made her kneel on broken glass, and repeatedly beat her -- because she was "kept home," and therefore never learned English, went to school, or acquired knowledge of financial matters.[32]

The problem of economic deprivation can be especially confining for immigrant victims of gender-motivated violence, who may be far from family and friends, and therefore lack networks of support in this country that are crucial to surviving outside the abusive relationship.[33] For this reason, § 13981 is especially helpful to immigrant victims of gender-motivated domestic violence because it provides them with a means of obtaining compensatory relief for the abuse suffered.[34] Using § 13981, immigrant

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[31] Sarah Tully Tapia, *The Helpless Immigrants: Abused Hispanic Women are 'the most vulnerable of all'*, Arizona Daily Star, April 25, 1999, at 1A, available in 1999 WL 5717585.

[32] Huang, *supra* note 24.

[33] This problem may be even more pronounced for undocumented women, who cannot work legally and have limited eligibility for public benefits because of their immigration status: "Significant numbers of undocumented spouses are deterred from leaving their abusers because they do not have the legal status or the employment authorization necessary to support themselves and their children." Teran, *supra* note 24, at 12; *see also* Leslye E. Orloff, Deeana Jang, & Catherine F. Klein, *With No Place to Turn: Improving Legal Advocacy for Battered Immigrant Women*, 29 Fam. L. Q. 313, 313 (1995) (relating story of Cecilia, an undocumented South American immigrant who remained dependent on her brutally abusive husband, in part because she had no legal means of supporting herself and her family in this country).

[34] Because gender-motivated domestic violence against immigrant women crosses socioeconomic boundaries, and because many immigrant

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victims can diminish the barrier of economic dependence that sometimes prevents them from leaving abusive relationships. In this manner, § 13981 helps to break the cycle of gender-related domestic violence, and to increase the ability of its victims to contribute independently to the national workforce.

4. Failures of State and Local Legal Systems

Even when immigrant women attempt to overcome the barriers to escape, and seek protection and redress from gender-motivated abuse, they often are treated with indifference or bias by state and local authorities.

Battered immigrant women are affected by the apathy and bias with which state and local justice systems treat domestic violence cases generally.[35] Even in cases of brutal abuse, many state and local prosecutors have been reluctant to press charges and fully prosecute alleged abusers, often following

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families earn income comparable to that earned by native families, many immigrant victims of gender-motivated violence likely will be able to obtain meaningful compensatory relief from their abusers under § 13981. *See generally* Michael Fix & Jeffrey S. Passel, The Urban Institute, *Immigration and Immigrants: Setting the Record Straight* 36 (1994) (reporting that, although individual immigrants tend to earn less income than natives, immigrant households earn nearly the same annual income as native households, and immigrant households headed by immigrants entering the United States before 1980 earn almost ten percent more annually than native households).

[35] The demonstrated inadequacy of the response of state and local justice systems to cases of violence against women, including domestic violence cases, was one of the primary bases for § 13981's enactment. *See, e.g.*, S. Rep. No. 102-197, at 42-48 (1991).

policies of automatically dismissing charges when the victim so requests.[36] One immigrant woman had been beaten so badly by her husband that she required extensive reconstructive surgery; the state's attorney, however, was reluctant to criminally prosecute the abuser because "it was only one incident."[37]

State and local judges and court personnel often have demonstrated hostility toward domestic violence victims, blaming them for "refusing" to leave their abusers. Examples abound in which judges have scolded, mocked, or threatened victims in open court.[38] Aside from facing outward discrimination, domestic violence victims also often are frustrated in their efforts to obtain relief by complicated and confusing judicial processes.[39]

In the case of battered immigrant women, language barriers may also preclude meaningful police assistance, as police may tend to believe an English-speaking abuser's story over a non-English-speaking victim's.[40] In addition,

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[36] *See* Epstein, *supra* note 19, at 15-16 (noting that, in response to outcries regarding low prosecution and conviction rates, certain jurisdictions have adopted "no-drop" policies, under which domestic violence charges are prosecuted regardless of the victim's expressed wishes).

[37] Kelly, *supra* note 18, at 693.

[38] In one case, a North Dakota judge reportedly warned a victim that "If you go back [to the perpetrator] one more time, I'll hit you myself." *See* Epstein, *supra* note 19, at 40; *see also id.* at 42-43 (providing additional egregious examples of judicial mockery of domestic violence victims).

[39] *See id.* at 21-28.

[40] Kelly, *supra* note 18, at 679 (discussing Spanish-speaking (Continued...)

sometimes police discrimination against immigrant women is direct: one Asian woman, upon reporting her husband's continued harassment and violation of his restraining order, was simply told by police to "go back to where she belongs."[41]

The failure of state and local authorities adequately to address the problem of domestic violence, particularly when coupled with the significant barriers already faced by battered immigrant women, leads many such women to refrain from or delay reporting abuse: one survey found that 83% of battered immigrants did not contact the police despite long histories of domestic violence.[42] These deterrents against reporting may work to eliminate the possibility of obtaining criminal convictions of abusers: even if the victim eventually reports the abuse, critical evidence of injury may be lost, and her story may be disbelieved because of her failure to come forward immediately.

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immigrant victim whose broken-English story of abuse was discounted by police in favor of her husband's denial, which was spoken in English); *see also* Malone, *supra* note 14 (observing that a major obstacle for battered Asian immigrants seeking police protection is that "[t]he police don't speak their language and sometimes the abuser is used as a translator").

[41] Kelly, *supra* note 18, at 678.

[42] *See* Orloff & Little, *supra* note 4, at 11; *see also, e.g.*, Preisser, *supra* note 5, at 690 (remarking that Asian Indian victims often fear reporting abuse to authorities "based on the perception that [the authorities] would lack understanding of their cultural, ethnic, linguistic, and immigrant issues"). Another factor deterring a battered immigrant from calling police may be experiences with police brutality in her home country or in her neighborhood in this country. *See* Orloff & Little, *supra*, at 11.

Recognizing the insufficiency of state and local attempts to address domestic violence, along with the legal obstacles to civil relief still in place in some states,[43] § 13981 provides a needed alternative source of federal civil redress for all victims of gender-motivated domestic violence, including battered immigrant victims. A civil remedy does not require the understanding of law enforcement authorities or prosecutors; instead, the victim controls her own fate. Moreover, whereas a failure to report an incident of violence immediately may be fatal to a prosecutor's willingness to proceed, that fear of reporting may not pose a barrier to obtaining civil relief. As such, particularly in view of the unique additional barriers they face in seeking protection and redress, battered immigrant women may be especially benefited by the opportunity provided by § 13981 to bypass state and local authorities.

II. SECTION 13981 IS AN ESSENTIAL AND CONSTITUTIONAL PART OF THE STATUTORY SCHEME ESTABLISHED BY VAWA TO PROVIDE PROTECTION AND REDRESS FOR VICTIMS OF GENDER-MOTIVATED VIOLENCE, INCLUDING IMMIGRANTS.

Section 13981 is a critical piece of the broad statutory scheme established by VAWA to provide all victims of gender-motivated violence, including battered immigrant women, with sources of protection and redress.

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[43] *See* S. Rep. No. 103-138, at 55.

VAWA seeks comprehensively to address the national problem of gender-based violence, including domestic violence. Among other things, VAWA establishes federal criminal penalties for interstate domestic violence crimes;[44] allocates grant monies for law enforcement education and domestic violence service organizations;[45] provides for interstate enforcement of civil protection orders;[46] and, through § 13981, gives battered women a reliable means of obtaining civil redress from their abusers.

VAWA also ameliorates particular hardships experienced by battered immigrant women. For example, the statute confers upon abused immigrants the right to "self-petition" for lawful residency in this country; through August 1999, 4,666 such immigrants had been approved for lawful status using this process.[47] Additionally, VAWA explicitly appropriates monies to be spent on funding organizations dedicated to assisting undeserved populations of victims, such as battered immigrants.[48]

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[44] *See* 18 U.S.C. §§ 2261, 2264 (1994 & Supp. III 1997).

[45] *See* 42 U.S.C. § 3796gg.

[46] *See* 42 U.S.C. §2265.

[47] *Stalking and Violence Against Women: Violence Against Women Act Oversight Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 1999 WL 27594937 (1999) (testimony of Bonnie Campbell, Director, Violence Against Women Office, U.S. Department of Justice).

[48] 42 U.S.C. § 3796gg(b)(5) (declaring that grant funds under VAWA may be used for "developing or improving delivery of victim services to racial, cultural, ethnic, and language minorities"); *see also id.* § 3796gg-2(7).

Although directed at all victims of gender-motivated violence, § 13981 is crucial for battered immigrant women for several reasons. *First*, as discussed above, the unique barriers to escape faced by immigrant women, coupled with the failures of state and local authorities to adequately address the problem of domestic violence, deter many battered immigrant women from reporting abuse when it occurs. By the time the abuse is reported, crucial evidence may be lost and witness credibility diminished, likely eliminating the possibility of obtaining a criminal conviction. Moreover, for those battered immigrant women whose immigration statuses are tied to their husbands', and who may therefore face deportation in the event their husbands are convicted of criminal abuse and deported, a civil remedy may be the only practically available means of obtaining redress for the abuse suffered.

As Congress found in enacting § 13981, many states retain interspousal immunities and other legal barriers that may preclude abused immigrant women from obtaining state civil remedies.[49] Section 13981 helps compensate for these obstacles by providing those battered immigrant women who eventually decide to take action against their abusers with a means of obtaining federal civil redress for the abuse they have suffered. Accordingly, § 13981 is an appropriate effort under Section 5 of the Fourteenth Amendment to remedy state and local failures to protect and provide redress for victims of gender-motivated violence.[50]

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[49] *See* S. Rep. No. 103-138, at 55.

[50] *See Wright v. Wright*, No. Civ. 98-572-A (W.D. Okla. Apr. 27, 1999); *Timm v. DeLong*, No. 8:98-CV-43 (D. Neb. June 22, 1998) (upholding §13981 under the Commerce Clause and Section 5 of the Fourteenth Amendment).

Second, § 13981 provides battered immigrant women with clear knowledge of the fact that domestic violence will not be tolerated in the United States under either the civil or criminal justice systems. This knowledge may encourage immigrants to seek protection from their abusers rather than endure the abuse based on a belief in its "acceptability."

Section 13981 constitutionally helps to eradicate the broad problem of gender-motivated violence, along with the particular problems faced by immigrant victims of gender-motivated domestic violence. Even though the problem of gender-based domestic violence against immigrant women is only a subset of the larger problem of gender-motivated violence, it alone affects families and communities nationwide, with certain substantial effects on interstate commerce.[51] As such, §13981 should be upheld as a proper exercise of Congress' power under the Commerce Clause.[52] This Court should preserve this important weapon in the fight against the national problem of violence against women, including the problem of gender-based domestic violence against immigrant women.

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[51] Because the briefs of the parties and other *amici* will address in detail the substantial effects on interstate commerce, this *amici* brief does not duplicate that discussion.

[52] *See, e.g., Ericson v. Syracuse Univ.*, No. 98 Civ. 3435 JSR, 1999 WL 212684 (S.D.N.Y. Apr. 13, 1999); *Ziegler v. Ziegler*, 28 F. Supp. 2d 601 (E.D. Wash. 1998); *Anisimov v. Lake*, 982 F. Supp. 531 (N.D. Ill. 1997); *Seaton v. Seaton*, 971 F. Supp. 1188 (E.D. Tenn. 1997); *Doe v. Doe*, 929 F. Supp. 608 (D. Conn. 1996) (all upholding §13981 as constitutionally enacted under the Commerce Clause).

CONCLUSION

The decision of the lower court should be reversed.

Respectfully submitted,

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In The

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

vs.

ANTONIO J. MORRISON, ET AL.,

Respondents,

and

CHRISTY BRZONKALA,

Petitioner,

vs.

ANTONIO J. MORRISON, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF THE STATES OF ARIZONA, ALASKA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, GEORGIA, HAWAII, ILLINOIS, IOWA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OKLAHOMA, OREGON, RHODE ISLAND, TENNESSEE, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA, AND WISCONSIN, AND THE COMMONWEALTHS OF MASSACHUSETTS AND PUERTO RICO, AS AMICI CURIAE IN SUPPORT OF PETITIONERS' BRIEF ON THE MERITS

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INTERESTS OF THE AMICI STATES

The issue presented in this case – the validity of 42 U.S.C. § 13981, the provision of the Violence Against Women Act of 1994, 42 U.S.C. §§ 13931 to 14040 (1994) ("VAWA") that creates a private right of action for victims of gender-motivated violence – is critical to the thirty-six Amici States and the Commonwealth of Puerto Rico. As employers of women and providers of services necessitated by domestic violence, the Amici States are directly and substantially affected by the monetary and other harm that results from violence against women.

Amici also have a strong public policy interest in the Court upholding Section 13981, which ensures that victims of gender-motivated violence receive as complete a remedy as possible. Amici therefore support the continuing cooperative efforts between state and local government on the one hand and the federal government on the other to reduce its occurrence to the greatest extent possible. This past summer, the National Association of Attorneys General supported the reauthorization of VAWA because the statute both has changed the way the nation addresses the crimes of domestic violence and sexual assault and has made a positive difference in thousands of women's lives. *Resolution of the National Association of Attorneys General* (June 23-26, 1999). At the same time, the Attorneys General recognized that domestic violence continues to be a major cause of injury to women and that reauthorization is necessary to "continue the commitment that Congress has made to eliminate the epidemic of domestic violence and sexual assault in this country." *Id.*

SUMMARY OF ARGUMENT

In concluding that Congress exceeded its Commerce Clause authority in enacting 42 U.S.C. § 13981, the Court of Appeals for the Fourth Circuit erroneously disregarded the extensive congressional findings that demonstrate that violence against women substantially affects interstate commerce. The Fourth Circuit's reasoning – that Section 13981 is not within Congress's commerce authority because it does not regulate an economic activity or include a jurisdictional element – is inconsistent with the "substantial effects" test set forth in *United States v. Lopez*, 514 U.S. 549, 559 (1995). The congressional findings that violence against women impacts interstate commerce are compelling and consistent with the findings of numerous, subsequent reports and the States' own experience. Because violence against women substantially affects Amici States by interfering with women's employment and by creating tremendous needs for medical and governmental services, Amici urge the Court to hold that Section 13981 is within Congress's commerce powers.

Further, in enacting the private right of action in Section 13981, Congress chose a particularly appropriate remedy for the harm caused by gender-motivated violence. The States' own studies demonstrate that their efforts to combat gender-motivated violence, while substantial, are not sufficient by themselves to remedy the harm caused by such violence or to eliminate its occurrence. Moreover, Section 13981 does not undermine federalism because the private right of action in Section 13981 complements state and local efforts to combat violence against women. The potential for parallel state and federal remedies for gender-motivated violence that may

exist as a result of Section 13981 is similar to the parallel remedies that already exist for other forms of discrimination. Therefore, the Court should uphold Section 13981 under the Commerce Clause.

ARGUMENT

I. Congress Rationally Concluded That Gender-Based Violence Substantially Affects Interstate Commerce.

A. The Court of Appeals Erred in Ignoring Congress's Findings That Gender-Based Violence Substantially Affects Interstate Commerce.

Ostensibly relying on *United States v. Lopez*, 514 U.S. 549 (1995), the Court of Appeals for the Fourth Circuit concluded that it could ignore Congress's findings about the effect of violence against women on interstate commerce because VAWA "neither regulates an economic activity nor includes a jurisdictional element." Pet. App. at 31a. The Fourth Circuit's simplistic approach does not square with the Court's careful analysis in *Lopez*. If the Court had intended in *Lopez* to adopt a bright line test that looked only to whether the regulated activity was economic, there would have been no reason for the Court to discuss, as it did, the lack of congressional findings as to the effect of the regulated activity on interstate commerce. *See Lopez*, 514 U.S. at 563 ("But to the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here."). Rather, the Court concluded that "the

proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce" and noted that it must decide whether a rational basis existed to support Congress's conclusion that there is such a substantial effect. *Id.* at 559. Moreover, the Court reaffirmed that the "question of congressional power under the Commerce Clause 'is necessarily one of degree' " and acknowledged that "[t]hese are not precise formulations, and in the nature of things they cannot be." *Id.* at 566-67 (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937)).

Thus, in addressing the validity of the private right of action in Section 13981 under Congress's commerce powers, this Court must examine whether Congress rationally concluded that gender-based violence substantially affects interstate commerce. Because gender-based violence substantially affects state institutions and has a detrimental impact on the States' economic well-being, the State Attorneys General overwhelmingly supported the enactment of VAWA. *See Crimes of Violence Motivated by Gender: Hearings Before the Subcomm. on Civil and Constitutional Rights of House Comm. on the Judiciary*, 103d Cong. 34-36 (1993) ("1993 Crimes of Violence Hearing") (letter from 41 Attorneys General from 38 States, the District of Columbia, and two territories). The States' experience is consistent with the extensive legislative history of VAWA and with the studies of gender-based violence generated after its enactment, all of which establish that violence against women affects interstate commerce in ways that are direct and immediate.

B. Gender-Based Violence Affects Interstate Commerce by Interfering with Women's Employment.

Congress found that violence against women imposes significant costs on employers by increasing absenteeism, lowering productivity, increasing health care costs, and creating higher turnover. *See Women and Violence: Hearings Before the Senate Comm. on the Judiciary*, 101st Cong. 29, 69 (1990) ("1990 Women and Violence Hearing") (nationally, violence against women costs employers between $3 billion and $5 billion annually due to absenteeism) (statements of Helen Neuborne and Sally Goldfarb); S. Rep. No. 103-138, at 54 n. 70 (1993) ("1993 S. Rep.") (homicide is the leading cause of death for women in the workplace); *id.* at 54 n. 69 (noting that almost 50% of rape victims "lose their job or are forced to quit in the aftermath of crime") (citing E. Ellis et al., *An Assessment of the Long Term Reaction to Rape*, 50 J. ABNORMAL PSYCHOLOGY 264 (1981)); S. Rep. 101-545 at 33 (1990) ("1990 S. Rep.") (women who remain employed after a rape or other crime of violence may experience a prolonged period of decreased productivity); 1993 S. Rep. at 41 (noting estimates that costs of domestic violence alone, including costs of victims' medical treatment, may amount to $5 billion to $10 billion dollars a year). Congress's finding that gender-based violence against women directly and detrimentally affects employers is supported by numerous, subsequent studies by both private, state, and other governmental entities, which document increased costs due to absenteeism and lower productivity,[1]

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[1] *See* EDK Associates for the Body Shop/YWCA, *The Many Faces of Domestic Violence and Its Impact on the Workplace* (1997)

increased health care payments,[2] and higher employee turn-over.[3]

(hereinafter EDK Report) (37% of women who had experienced domestic violence report this abuse had an impact on their work performance in the form of lateness, missed work, keeping a job, or obtaining a promotion); New York State Dep't of Labor, *Report to the New York State Legislature on Employees Separated from Employment Due to Domestic Violence* (1996) (hereinafter New York Report) (74% percent of employed battered women are harassed at work, 54% miss at least three days of work a month, 56% are late for work at least five times a month, and 75% use company time to call doctors, lawyers, shelters, counselors, and others because they cannot do so at home); Patricia Horn, *Beating Back the Revolution: Domestic Violence's Economic Toll on Women*, DOLLARS & SENSE, Dec. 1992, at 12, 21 (domestic violence costs employers hundreds of thousands of lost paid days of work annually) (citing a U.S. Department of Justice survey).

[2] *See* Pennsylvania Blue Shield Institute, *Social Problems and Rising Health Care Costs in Pennsylvania* 35 (1992) (the total health care costs of family violence are estimated in the hundred of millions of dollars each year, much of which is paid by employers); *see also* Catherine Wisner, et al., *Intimate Partner Violence Against Women: Do Victims Cost Health Plans More?*, JOURNAL OF FAMILY PRACTICE, 48:439 (1999) (women who were victims of intimate partner violence cost a Minnesota health plan approximately 92% more than a random sample of general female enrollees).

[3] *See* Jody Raphael & Richard Tolman, *Trapped by Poverty, Trapped by Abuse: New Evidence Documenting the Relationship Between Domestic Violence and Welfare*, at 33 (1997) (studies of abused women in Massachusetts, New Jersey, and Illinois confirm that abused women seek employment but are not able to maintain it); EDK Report at 13-14 (20% of women who experienced domestic abuse reported having difficulty keeping jobs); New York Report at 1 (domestic violence often affects a victim's employment status by contributing to the loss of a job). Employers also lose valuable women employees as a result of

Congress also found that employers have responded to the effect on "such bottom line issues as tardiness, poor performance, increased medical claims, interpersonal conflicts in the workplace, depression, stress and substance abuse" by directly addressing domestic violence in order to reduce their costs and protect their employees. *See Hearings on Domestic Violence: Hearings on S. 596 Before the Senate Comm. on the Judiciary*, 103d Cong. 15 (1993) (statement of James Hardeman, Polaroid Corp.).[4] And, consistent with the congressional finding that employers have responded to the effects of violence,

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homicide. *See* Women in Public Service, *Hidden Violence Against Women at Work* (1995) (homicide is a leading cause of death for women in the workplace); R. Bachman & L.E. Saltzman, *Violence Against Women: Estimates from the Redesigned Survey* 4 (1995) (28% of female homicide victims are murdered by an intimate or other relative). In addition, government employees are much more likely to be victims of workplace violence than other employees. *See* Greg Warchol, *Workplace Violence, 1992-96* 2 (1998) (while government employees make up approximately 16% of the national workforce, about 37% of the victims of workplace violence were employed by a federal, state, or county government organization).

[4] This congressional finding is also directly corroborated by a recent publication of the American Bar Association (ABA). ABA Commission on Domestic Violence, *A Guide for Employers: Domestic Violence in the Workplace* (1999). The ABA Commission on Domestic Violence has been working with the corporate sector to eradicate domestic violence in the United States and has found that employers embrace the ABA's efforts because "domestic violence has a direct impact on the 'bottom line' – costing U.S. companies an estimated four to five billion dollars per year in absenteeism, employee turnover, reduced productivity, higher health insurance premiums, and the like." *Id.* at 3.

States have responded to the effects of domestic violence on employers both in their capacity as major employers of women and in the interest of assisting employers within their borders. *See, e.g.*, Maryland Exec. Order No. 1.01.1998.25 (1998) (recognizing that domestic violence costs American businesses an estimated $3 billion to $5 billion annually and that the State of Maryland is affected by these costs as the State's largest employer, Maryland's Governor ordered all state agencies to provide training to their employees on how to address domestic violence problems in the workplace); *New York Report* at 9 (after studying the issue of employees separated from work due to domestic violence, the New York Department of Labor concluded that domestic violence "is a serious problem with significant impact on the workplace and it requires collaborative efforts by victims, their advocates, government, employers and labor unions"); Leslie Landes, *Domestic Violence Affects Workplace*, CHICAGO TRIBUNE (Oct. 1, 1999) (City of Chicago has created a comprehensive work violence policy including a domestic violence component in recognition of the need for government and business entities to assist employees who suffer from domestic violence); U.S. Dep't of Labor, *Facts on Working Women*, No. 96-3 (Oct. 1996) (the City of Tacoma, Washington initiated a broad-based domestic violence educational campaign in 1995 targeted at its 180,000 citizens and 3,500 employees).

In light of the compelling evidence that domestic violence directly and detrimentally interferes with women's employment, there can be no question that Congress rationally concluded that it interferes with interstate commerce. *Cf. New York v. United States*, 505 U.S. 144,

158 (1992) (recognizing that activities that affect the national economy are within Congress's power to regulate under the Commerce Clause).

C. Gender-Based Violence Affects Interstate Commerce by Creating Tremendous Needs for Medical and Governmental Services.

Congress also found that gender-based violence affects interstate commerce by draining the nation's medical services and increasing the need for government services. *See, e.g., Violence Against Women: Victims of the System, Hearings Before the Senate Judiciary Committee*, 102nd Cong. 240 (1991) (*"1991 Violence Against Women Hearing"*) (medical costs related to domestic violence are an estimated $100 million annually) (testimony of National Federation of Business and Professional Women); *1991 Violence Against Women Hearing*, at 65 (one-third of women seeking emergency treatment in Illinois have been severely beaten by a husband) (statement of 1991 Illinois Attorney General Roland Burris); *Violence Against Women, Hearings Before the Subcommittee on Crime and Criminal Justice of the House Judiciary Committee*, 102nd Cong. 64 (1992) (*"1992 Violence Against Women Hearing"*) (then-Surgeon General Koop is quoted as describing domestic violence as the number one health problem for women); 1990 S. Rep. ("as many as 50% percent of homeless women and children are fleeing domestic violence"). In urging Congress to pass VAWA, the State Attorneys General noted these costs of domestic violence: "State and local governments, law enforcement agencies, courts, schools, domestic violence shelters and safe homes have borne the tremendous burdens caused by gender-based

violence." *See 1993 Crimes of Violence Hearing* at 34-36 (letter from 41 Attorneys General from 38 States, the District of Columbia, and two territories). Recent national, state, and local reports strongly corroborate the congressional findings – as well as the Attorneys General's supportive statement – concerning the tremendous costs resulting from gender-based violence.

The medical costs arising from violence against women are significant and burden state and local government directly through government-subsidized health care and indirectly as employers. *See* Michael A. Rodriguez, et al., *Screening and Intervention for Intimate Partner Abuse: Practices and Attitudes of Primary Care Physicians*, JOURNAL OF THE AMERICAN MEDICAL ASS'N, 282:468-74 (1999) ("compared with women with no history of abuse, abused women have higher levels of health care use . . . 31% to 54% of female patients seeking emergency services, 21% to 66% of those seeking general medical care, and up to 20% of those seeking prenatal care report experiencing intimate partner abuse.")(citations omitted); Michael Rand, *Violence Related Injuries Treated in Hospital Emergency Room Departments* 5 (1997) (in 1994, approximately 67% of women seeking injury-related treatment in hospital emergency rooms were there because of injuries inflicted by a current or former spouse, an intimate partner, or an acquaintance); American Medical Ass'n Council on Scientific Affairs, *Violence Against Women: Relevance for Medical Practitioners*, JOURNAL OF THE AMERICAN MEDICAL ASS'N, 267: 3184-89 (1992) (1.5 million women seek medical treatment related to abuse annually); Lawrence A. Greenfield, et al., Washington D.C. Bureau of Justice Statistics, U.S. Dep't of Justice, *Violence by Intimates: Analysis*

of Data on Crimes by Current or Former Spouses, Boyfriends, and Girlfriends 21 (1998) (the average yearly loss incurred by female victims of intimate violence in the form of medical expenses is $61 million); Harris Meyer, *The Billion Dollar Epidemic*, AMERICAN MEDICAL NEWS (Jan. 6, 1992) (a study at Rush Medical Center estimated an average charge for medical services to abused women, children, and older people as $1,633 per person per year, excluding psychological or follow-up costs); Ted R. Miller, et al., *Victim Costs and Consequences: A New Look* (Nat'l Institute of Justice) (1996) at 1, 19, 23 (the total costs suffered by the victims of rape are greater than costs suffered by other victims of violent crime; the estimated cost of rape to its victims is $127 billion per year; government bears a significant portion of the costs through restorative and emergency services to victims, health insurance payments, and lost tax revenues and Medicare and Medicaid payments); *see also* note 2 *supra*.

Violence against women also greatly increases the need for state government welfare services. Recent studies establish that a significantly greater percentage of women who receive Aid to Family with Dependent Children (AFDC) benefits are victims of domestic violence and that domestic violence is a significant factor in preventing women from returning to work and achieving economic self-sufficiency. *See* Raphael & Tolman, *supra* note 3 at 5, 33 (four recent studies of welfare recipients "document large and consistently high percentage of women on AFDC currently embroiled in violent relationships" and "[s]everal of the studies report interference from intimate partners with education, training and work as well as arguments about child support, visitation and

child custody which can prevent abused women from using child care necessary for employment or deter them from getting other needed support") (citations omitted); *see also* Susan Pennell, et al., San Diego Association of Governments, *The Nature and Scope of Violence Against Women in San Diego* at 37 (over one-third of the women at domestic violence shelters in San Diego reported receiving welfare or social security) (September 1999 Draft).

Other state and local governmental services that are necessary because of violence against women include assistance to homeless and emergency shelters and law enforcement and court services. For information on the costs and need for shelters, *see, e.g.*, Women & Housing Task Force, *Unlocking the Door: A Call to Action, Battered Women* (September 1996) (citing Elizabeth Schneider, *Legal Reform Efforts for Battered Women: Past, Present and Future* (prepared for the Ford Foundation, July, 1990)) (of all homeless women and children, 50% are fleeing domestic violence); Francine G. Hermelin, *Women Shelters: Demand Up, Donations Down*, WORKING WOMEN (November 1994) (The Women Against Abuse Center in Philadelphia reported an annual budget of $2.5 million or $68 per person per day); Sharon Chanley & Jesse Chanley, Jr., *Cost/Benefit Analysis of Domestic Violence Shelter Services* 1 (March 1999) (unpublished manuscript on file with Arizona State University) (total annual costs for Kingman Aid to Abused People Shelter including public assistance was $356,823 to $841,710); Arizona Dep't of Economic Security, *Highlights of the Uniform Family Violence Program* (from July, 1997 to June 30, 1998, crisis shelter and counseling was provided to 7,010 women and children who received 107,920 nights of emergency shelter in Arizona).

For information relating to criminal justice costs, *see, e.g.*, Chicago Police Department, *Domestic Violence Fact Sheet, Staff Support for the Coordinating Council* 1 (in 1995, Chicago police responded to nearly 153,000 domestic violence-related calls for service – an average of 419 per day); *id.* at 2 (in 1995, nearly 2,500 domestic-related reports were filed by Chicago police per month, which the Cook County State's Attorney's Office reports is an increase of 30% from the previous year); Wisconsin Dep't of Justice, *1997 Wisconsin Domestic Abuse Incident Report* at 10 (1999) (17,528 arrests for domestic abuse in Wisconsin in 1997); Nancy Cross Dunham & Linda Leetch, *The Health Care Components of Domestic Violence and Abuse: Implications for Wisconsin Providers and Health Care Systems*, at 2 (1996) (in Wisconsin in 1993 there were over 32,000 reports of domestic violence to law enforcement); Marianne Zawitz, U.S. Dep't of Justice, *Violence Between Intimates: Domestic Violence* 8 (1994) (20,170 male prisoners were incarcerated for harming an intimate in 1991); Phoenix Police Dep't, Family Investigations Unit, *Uniform Law Enforcement Domestic Violence Statistical Reports* (Quarterly reports, 1999) (Phoenix police responded to 557 calls for service of domestic violence-related orders of protection from January through September, 1999.)

Domestic violence also affects the well-being of our nation's children, directly harming our most precious resource, and creating a need for increased services to those children. *See, e.g.*, American Psychological Ass'n, *Violence and the Family: Report by the American Psychological Association Presidential Task Force on Violence and the Family*, at 80 (1996) (domestic violence is strongly correlated with child abuse – between 40% and 60% of men

who abuse their female partners also abuse their children); *id.* at 40 (fathers who batter mothers are two times more likely to seek sole physical custody of their children than non-violent fathers); Elnat Peled, et al., *Ending the Cycle of the Violence: Community Responses to Battered Women* at 4-5 (1995) (children who witness domestic violence are at a high risk for anxiety and depression and exhibit more aggressive, antisocial, inhibited, and fearful behaviors); Howard Holtz & Kathleen Furniss, *The Health Care Provider's Role in Domestic Violence*, TRENDS IN HEALTH CARE, LAW & ETHICS, 8:47 (1993) (25 to 45% of women who have experienced battering during pregnancy have an increased chance of miscarriage, pre-term labor, and giving birth to infants with low birth weight); Staff of the House of Representatives Committee on Ways and Means, 105th Cong., *1998 Green Book: Background Material and Data on Programs Within the Jurisdiction of the Comm. on Ways and Means* 784, 790 (1998) (of the 235,000 children in foster care (1996 estimate), an estimated fifty percent are victims of abuse).

Because of the staggering costs stemming from violence against women, including the increase in need for governmental services and the increase in medical and insurance costs, Congress rationally concluded that it affects interstate commerce. *See* H.R. Conf. Rep. No. 103-711, at 385 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1839, 1853 (crimes of violence motivated by gender have a substantial effect on interstate commerce by diminishing national productivity, increasing medical and other costs, and decreasing the supply and the demand for interstate products). Because Congress rationally concluded that violence against women has a direct and substantial

impact on interstate commerce, the Commerce Clause allows regulation of this activity even though it is not itself "economic."

II. The Remedy Congress Chose Is Particularly Appropriate, Given the States' Experience with Gender-Motivated Violence.

Once the Court is satisfied that the problem addressed by Congress has a substantial impact on interstate commerce, the remaining inquiry under the Commerce Clause is "whether the means selected by Congress were reasonable." *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 283 (1981). VAWA's civil remedy is particularly reasonable and appropriate in light of the evidence before Congress that the States' efforts to combat gender-motivated violence, while substantial, are not sufficient by themselves to eradicate this deeply entrenched problem. *See id.* at 280 (citing congressional finding of inadequacies in state laws as support for legitimacy of federal legislation). The remedy that Congress chose is a necessary complement to the States' continuing efforts to redress gender-motivated violence, and also comports with the federal government's recognized role in protecting civil rights.

A. Congress Had Substantial Evidence Before It That the States' Own Efforts to Combat Gender-Motivated Violence Have Been Inadequate.

The States' own assessments of their legal responses to violence against women demonstrate that state protections remain inadequate, and thus support congressional

enactment of VAWA's civil remedy. While considering VAWA, Congress had before it the reports of some twenty-one States where task forces or similar bodies had been appointed, usually by the State's judicial branch, to examine the degree to which women could count on the protection of state courts. *See* S. Rep. No. 102-197 at 43 n.40 (1991) (citing state reports) (generally, the "State Task Force Reports"); 1993 S. Rep. at 45 n.29, 46 n.35 & 49 n.52 (same). Many of these state task forces described how after years of neglecting domestic violence, their legislatures had adopted statutes to provide effective remedies, including orders of protection, for its victims. Yet, State after State echoed the findings of the New York task force: while the statutory framework appeared adequate to protect women from violence in their homes, this "abstract efficacy stands in stark contrast to the reality some women face when seeking court-ordered protection." New York Task Force on Women in the Courts, *Report* 32 (1986) ("New York Task Force Report").[5]

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[5] In this respect, the legislative record of VAWA is parallel to the record supporting the Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248 ("FACE"), the constitutionality of which has been upheld every time it has come before a federal court of appeals. *United States v. Weslin*, 156 F.3d 292, 296 (2d Cir. 1998), *cert. denied*, 119 S.Ct. 804 (1999); *Hoffman v. Hunt*, 126 F.3d 575, 588 (4th Cir. 1997), *cert. denied*, 523 U.S. 1136 (1998); *United States v. Bird*, 124 F.3d 667, 682 (5th Cir. 1997), *cert. denied*, 523 U.S. 1006 (1998); *Terry v. Reno*, 101 F.3d 1412, 1418 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1264 (1997); *United States v. Dinwiddie*, 76 F.3d 913, 921 (8th Cir.), *cert. denied*, 519 U.S. 1043 (1996); *United States v. Wilson*, 73 F.3d 675, 686 (7th Cir. 1995), *cert. denied*, 519 U.S. 806 (1996); *Cheffer v. Reno*, 55 F.3d 1517, 1521 (11th Cir. 1995); *see also Hill v. Thomas*, 973 P.2d 1246 (Colo. 1999) *cert. granted by Hill v. Colorado*, 67 U.S.L.W. 3718 (No. 98-1856) (U.S. Sep. 28, 1999). FACE, like VAWA, reaches local, private, non-commercial acts that Congress found had substantial effects on interstate commerce. *Compare* S. Rep. No. 103-117, at 19, 31 (1993) (FACE) *with* H.R. Conf. Rep. No. 103-711, at 385, *reprinted in* 1994 U.S.C.C.A.N. 1853. Congress in each instance found that local and state law enforcement had thus far been unable to prevent the deprivation of civil rights at issue, notwithstanding the fact that laws existed which on their face were sufficient to address the targeted conduct. *Compare* S. Rep. No. 103-117, at 19-21 (FACE) *with* 1993 S. Rep. at 49-50 (VAWA).

Florida, for example, characterized its justice system's overall response to domestic violence as "extremely deficient," Florida Supreme Court Gender Bias Study Commission, *Report* 103 (1990), and found that while statutes offered adequate protection against domestic violence, "law enforcement throughout Florida, with some notable exceptions, fails to enforce these statutes." *Id.* at 107-09. Likewise, the Michigan task force found "compelling evidence to conclude that domestic abuse victims do not receive the relief, either civil or criminal, that our legislature intended to provide." Michigan Supreme Court Task Force on Gender Issues in the Courts, *Final Report* 35 (1989). *See also* Supreme Court of Georgia, *Gender and Justice in the Courts* 5 (1991) (despite state law authorizing warrantless arrest where probable cause exists that act of family violence occurred, police "continually refuse to arrest the batterer at the scene"); *id.* at 29-30 (noting inadequate implementation of Georgia's Family Violence Act provisions for temporary protective order); Illinois Task Force, *Gender Bias in the Courts* 19 (1990) ("there remain pervasive problems in the attitudes of those charged with enforcement" of Illinois's Domestic Violence Act enacted in 1982); Louisiana Task Force on

Women in the Courts, *Final Report* 84-92 (1992) (discussing at length inadequate implementation of Louisiana's Domestic Abuse Assistance Act, resulting in inadequate or nonexistent protection of many domestic violence victims); Maryland Special Joint Committee, *Gender Bias in the Courts* 1, 11-14 (1989) ("many women seeking civil and criminal relief against their batterers still face barriers within the judicial system"); Massachusetts Supreme Judicial Court, *Gender Bias Study of the Court System in Massachusetts* 86-91 (1989) (identifying procedural and other obstacles that prevent victims of domestic violence from being adequately protected by orders of protection); Nevada Supreme Court Gender Bias Task Force, *Justice for Women* 56-57 (1989) (finding inconsistent enforcement of 1985 domestic violence statute, so that women "continue to be disadvantaged by failure of the legal system to deal in an adequate manner with the problems of battered women"); Rhode Island Committee on Women in the Courts, *Final Report* 36 (1987) (despite "effort to provide an adequate legal framework for protecting victims" of domestic violence, barriers, including attitudes of judges, court personnel, and deputy sheriffs, "discourage victims" from using remedies); Utah Task Force on Gender and Justice, *Report to the Utah Judicial Council* 54 (1990) (finding "ineffective enforcement of domestic violence laws" by police, prosecutors, and judges, including failure to impose sanctions for violations of protective orders); Vermont Supreme Court and Vermont Bar Association, *Gender and Justice: Report of the Vermont Task Force on Gender Bias in the Legal System* 1, 3 (1991) ("Vermont Report") (finding that the State's abuse prevention act is "not being adequately implemented or enforced," and

that "domestic battering and abuse continue to be serious problems that are not adequately addressed by our legal system"); Washington State Task Force, *Gender and Justice in the Courts* 25-26 (1989) ("Washington Report") (finding that existing laws provide adequate framework for handling domestic violence cases, but that victims face barriers in obtaining and enforcing protective orders); Wisconsin Equal Justice Task Force, *Final Report* 168 (1991) (finding that victims' use of protective orders were limited by fee provisions, difficult forms, lack of legal representation, and attitudes of some court personnel).

In a similar vein, many State Task Force Reports took note of relatively recent, significant reforms in state sexual assault laws, yet found that these reforms often have little impact on the prosecution of rape when the assault is committed by someone with whom the victim is acquainted. The Minnesota Task Force found that legislative reform of that State's sexual assault statute in 1975 failed to benefit the 90% of rape victims who were acquainted with their attackers, and that "[s]ignificant numbers of serious sex offenses are not heard in court due to gender-based stereotypes about acquaintance rape." Minnesota Supreme Court Task Force on Gender Issues in the Courts, *Final Report* 57-58, 63 (1989). These findings demonstrate a tremendous gap in the remedies available to women who are victimized by sex crimes, because the vast majority of such crimes are perpetrated by an attacker who is known to the victim. *Women and Violence, Part 2, Hearings Before Senate Judiciary Comm.*, 101st Cong. 31, 35-36, 38 (1990) (statement of Mary P. Koss). *See also* New York Task Force Report at 65, 68,

78-81 (after legislative reform, rape was no longer "virtually unprosecutable," yet "problems in enforcement and protection of the victim remain," particularly when a woman is acquainted with her rapist); Vermont Report at 138 (finding that sexual assault charges may not be treated as seriously where victim is acquainted with attacker); Washington Report at 38, 45 (finding that 1975 statutory revision improved treatment of rape cases, but that "many of the old problems still persist," including failure to adequately prosecute cases, and differential treatment of cases where victim is acquainted with attacker).

The State Task Force Reports demonstrate that States' longstanding efforts to address pervasive gender-based violence – efforts that have included significant legislative changes in domestic violence and sexual assault statutes – have thus far fallen far short of eliminating a widespread problem that continues to impair women's lives and their participation in the national economy. In the light of this evidence, Congress reasonably determined that allowing women who have been victimized by gender-based violence to pursue claims against their attackers in federal court could help to remedy this problem. *See* H.R. Conf. Rep No. 103-711, at 385 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1839, 1853 ("a Federal civil rights action . . . is necessary to guarantee equal protection of the laws and to reduce the substantial adverse effects on interstate commerce caused by crimes of violence motivated by gender").

B. Congress Chose a Remedy That Complements the States' Efforts to Combat Gender-Motivated Violence.

Because the remedy provided by the private right of action in Section 13981 complements state and local efforts to combat violence against women without in any way compromising those efforts, it does not undermine federalism by intruding in an area of traditional state concern. *See Lopez*, 514 U.S. at 583 (Kennedy, J., concurring) (criticizing statute there invalidated for its "tendency . . . to displace state regulation in areas of traditional state concern"). The Court therefore may uphold Congress's authority to enact VAWA without hesitation.

The crimes of violence that are actionable under VAWA's civil provision are defined by reference to existing federal and state law. 42 U.S.C. § 13981(d)(2). Thus, where no effective remedy exists for the victims of these crimes, VAWA creates one that is consistent with state law; and where a state (whether now or in the future) provides effective redress to victims of gender-motivated violence, VAWA establishes a complementary federal remedy – one that effectuates the "special societal judgment that crimes motivated by gender bias are unacceptable because they violate the victims' civil rights." 1993 S. Rep. at 50. By providing the civil remedy, Congress made it possible for gender-based violence – and its impact on interstate commerce – to be redressed now, while States continue to reform and refine their approaches to this scourge.

The potential for parallel state and federal remedies for discrimination that takes the form of gender-

motivated violence is congruent with the parallel remedies that already exist for other forms of discrimination – remedies that have been used by thousands of Americans without any diminution of principles of federalism. For example, in many states, victims of employment discrimination may bring suit under both federal law, 42 U.S.C. §§ 2000e-2000e-17, and state law. *See, e.g.*, Alaska Stat. § 18.80.200; Ariz. Rev. Stat. Ann. § 41-1463; Colo. Rev. Stat. § 24-34-402; Fla. Stat. § 760.10; 775 Ill. Comp. Stat. §§ 5/1-103 & 5/2-102; La. Rev. Stat. § 23:332; 5 Me. Rev. Stat. § 4572; N.Y. Exec. Law § 296; Texas Labor Code § 21.051.

Finally, the fact that the damage inflicted by gender-based violence spreads beyond its impact on interstate commerce does not in any way diminish congressional authority to invoke the Commerce Clause to combat it. This Court dealt squarely with this issue when it upheld the public accommodations section of the Civil Rights Act of 1964 as a valid exercise of Commerce Clause authority. *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964). According to the Court, the United States Senate had forthrightly acknowledged that the primary purpose of that legislation was "to vindicate the deprivation of personal dignity that surely accompanies denials of equal access to public establishments." *Id.* at 250 (internal quotation marks and citation omitted).

> But that fact does not detract from the overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse. It was this burden which empowered Congress to enact appropriate legislation, and, given this basis for the exercise of its

> power, Congress was not restricted by the fact that the particular obstruction to interstate commerce with which it was dealing was also deemed a moral and social wrong.

Id. at 257. Likewise here, where a massive record has demonstrated the disruptive effect that gender-motivated violence has on interstate commerce, Congress is free to act against violence that "not only wounds physically, it degrades and terrorizes, instilling fear and inhibiting the lives of all those similarly situated," by recognizing this violence "for what it is – a hate crime." 1993 S. Rep. at 49 (internal quotation marks and citations omitted).

CONCLUSION

The Court should reverse the Court of Appeals' decision below and remand the case so that Petitioner Brzonkala may proceed with her Section 13981 claim against Respondents.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

UNITED STATES, *Petitioner,*

v.

ANTONIO J. MORRISON AND
JAMES LANDALE CRAWFORD, *Respondents.*

CHRISTY BRZONKALA, *Petitioner,*

v.

ANTONIO J. MORRISON AND
JAMES LANDALE CRAWFORD, *Respondents.*

On Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

BRIEF OF SENATOR JOSEPH R. BIDEN, JR. AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether 42 U.S.C. § 13981, the provision of the Violence Against Women Act of 1994 that creates a private right of action for victims of gender-motivated violence, is a valid exercise of Congress' power under the Commerce Clause of the Constitution.

2. Whether 42 U.S.C. § 13981 is a valid exercise of Congress' power under the Enforcement Clause of the Fourteenth Amendment to the Constitution.

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S. Rep. No. 101-545 (1990) 8, 9, 27, 28

S. Rep. No. 102-197 (1991) ..... *passim*

S. Rep. No. 103-138 (1993) ..... *passim*

138 Cong. Rec. 582 (1992) 16

139 Cong. Rec. 27,547 (1993) 3

139 Cong. Rec. 30,107 (1993) 17

139 Cong. Rec. 30,588 (1993) 3

139 Cong. Rec. 31,291 (1993) 9, 12, 26

139 Cong. Rec. 31,292 (1993) 11, 26

139 Cong. Rec. 31,337 (1993) 3

140 Cong. Rec. 23,618 (1994) 3

140 Cong. Rec. 8141-42 (1994) 3

140 Cong. Rec. 23,618 (1994) 3

140 Cong. Rec. 24,115 (1994) 3

Crimes of Violence Motivated by Gender: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 103d Cong. (1993) . . . . . *passim*

Domestic Violence: Not Just a Family Matter: Hearing Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary, 103d Cong. (1994) 2, 9, 11, 12, 25

Domestic Violence: Terrorism in the Home: Hearing Before the Subcomm. on Children, Family, Drugs and Alcoholism of the Senate Comm. on Labor and Human Resources, 101st Cong. (1990) 2, 12, 26

Hearing on Domestic Violence: Hearing Before the Senate Comm. on the Judiciary, 103d Cong. (1993) 2, 9, 11, 26

Violence Against Women: Fighting the Fear: Hearing Before the Senate Comm. on the Judiciary, 103d Cong. (1993) . . . . . *passim*

Violent Crimes Against Women: Hearing Before the Senate Comm. on the Judiciary, 103d Cong. (1993) 2, 12, 25

Violence Against Women: Hearing Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary, 102d Cong. (1992) 2, 11, 12, 25, 26

Violence Against Women: Victims of the System: Hearing Before the Senate Comm. on the Judiciary, 102d Cong. (1991) . . . . . *passim*

Women and Violence: Hearings Before the Senate Comm. on the Judiciary, 101st Cong. (1990) . . . . . *passim*

MISCELLANEOUS

Administrative Office of the California Courts Judicial Council, *Achieving Equal Justice for Women and Men in the Courts* (1990) 24

Joseph R. Biden, Jr., *The Civil Rights Remedy of the Violence Against Women Act: A Defense*, 37 Harv. J. on Legis. (forthcoming Jan. 2000) 1

Victoria F. Nourse, *Where Violence, Relationship, and Equality Meet: The Violence Against Women Act's Civil Rights Remedy*, 11 Wis. Women's L.J. 1 (1996) 8

Staff of Senate Comm. on Judiciary, *Violence Against Women: A Week in the Life of America* (Oct. 1992) 12

Supreme Court of Georgia, *Gender and Justice in the Courts* (1991) 24

Texas Gender Bias Task Force, *Final Report* (1994) 24

INTEREST OF AMICUS CURIAE[1]

Senator Joseph R. Biden, Jr. is the author of the Violence Against Women Act, which includes the civil rights remedy at issue in this case. The Act enjoyed tremendous bipartisan support, with 68 cosponsors in the Senate and 226 cosponsors in the House of Representatives, and passed both Houses by overwhelming margins.

As a former Chairman of the Senate Judiciary Committee, chief sponsor of the Act, and champion of its civil rights remedy, Senator Biden is uniquely qualified to offer the congressional perspective as to why the civil rights provision is both necessary and within Congress' power, pursuant to the Commerce Clause and § 5 of the Fourteenth Amendment. He believes that his detailed description of the statute's history and supporting legislative record will aid the Court in resolving the issues presented.[2]

STATEMENT

1. Senator Biden first introduced the Violence Against Women Act in 1990 "in response to the escalating problem of violence against women," S. Rep. No. 103-138, at 37 (1993) ("1993 S. Rep.")—an unfolding "national tragedy played out every day in the lives of millions of American women at home, in the workplace, and on the street." S. Rep. No. 102-197, at 39 (1991) ("1991 S. Rep."). During the four-year investigation that followed, Congress heard testimony from a wide range of

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[1] In accordance with Supreme Court Rule 37.6, amicus curiae represents that no counsel for a party authored this brief in whole or in part, and no person or entity, other than amicus, has made a monetary contribution to the preparation or submission of this brief. All parties to these consolidated cases have consented to the filing of this brief, and the letters of consent have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

[2] Senator Biden also has written a law review article defending the constitutionality of the Violence Against Women Act civil rights remedy. The article is expected in print this January. *See* Joseph R. Biden, Jr., *The Civil Rights Remedy of the Violence Against Women Act: A Defense*, 37 Harv. J. on Legis. (forthcoming Jan. 2000).

experts, including judges, law enforcement officers, prosecutors, state attorneys general, law professors, social scientists, physicians, and victims of violence, and generated a massive legislative record in support of the legislation.[3]

As detailed below, the legislative record amassed by Congress after years of testimony and close analysis demonstrates that violence against women was (and is) a national problem of the first order, a problem that Congress found seriously impeded women from participating fully in the commercial life of the nation—and one that state legal systems had been both unable and unwilling to remedy.

2. Senator Biden introduced the Violence Against Women Act, comprehensive federal legislation to combat violent crime against women, in each of the 101st through 103d Congresses. *See* S. 2754, 101st Cong. (1990); S. 15, 102d Cong. (1991); S. 11, 103d Cong. (1993). Companion legislation was introduced in the House. H.R. 5468, 101st Cong. (1990); H.R. 1502, 102d Cong. (1991); H.R. 1133, 103d Cong. (1993). The Act enjoyed tremendous bipartisan support and passed both

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[3] *See, e.g., Domestic Violence: Not Just a Family Matter: Hearing Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary,* 103d Cong. (1994) ("1994 H.R. Hrg."); *Crimes of Violence Motivated by Gender: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary,* 103d Cong. (1993) ("1993 H.R. Hrg."); *Violence Against Women: Fighting the Fear: Hearing Before the Senate Comm. on the Judiciary,* 103d Cong. (1993) ("Nov. 1993 S. Hrg."); *Violent Crimes Against Women: Hearing Before the Senate Comm. on the Judiciary,* 103d Cong. (1993) ("Apr. 1993 S. Hrg."); *Hearing on Domestic Violence: Hearing Before the Senate Comm. on the Judiciary,* 103d Cong. (1993) ("Feb. 1993 S. Hrg."); *Violence Against Women: Hearing Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary,* 102d Cong. (1992) ("1992 H.R. Hrg."); *Violence Against Women: Victims of the System: Hearing Before the Senate Comm. on the Judiciary,* 102d Cong. (1991) ("1991 S. Hrg."); *Women and Violence: Hearings Before the Senate Comm. on the Judiciary,* 101st Cong. (1990) ("1990 S. Hrg."); *Domestic Violence: Terrorism in the Home: Hearing Before the Subcomm. on Children, Family, Drugs and Alcoholism of the Senate Comm. on Labor and Human Resources,* 101st Cong. (1990) ("1990 S. Labor Hrg.").

Houses by overwhelming margins.[4] After a conference to work out differences between the two bills,[5] both legislative bodies adopted the Conference Report, 140 Cong. Rec. 24,115 (1994) (Senate passage); 140 Cong. Rec. 23,618 (1994) (House passage), and on September 13, 1994, the President signed into law the Violent Crime Control and Law Enforcement Act of 1994, which included the Violence Against Women Act.

3. In addressing violence against women, Congress employed "several different complementary strategies," 1991 S. Rep. 34, to attack the problem on all fronts. A key subtitle in this multifaceted legislative scheme, the Civil Rights Remedies for Gender-Motivated Violence Act, creates a new federal civil cause of action that allows victims of gender-motivated violence to sue their attackers in court. *See* Pub. L. No. 103-322, Title IV, Subtitle C, §§ 40301-40303, 108 Stat. 1941-42 (codified at 42 U.S.C. § 13981). The civil rights remedy was among the most closely considered provisions of the Violence Against Women Act. After years of expert testimony and careful deliberation, Congress concluded that the provision was necessary; Congress

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[4] S. 11, reported favorably by the Senate Judiciary Committee in 1993, claimed a total of 68 cosponsors; its House counterpart, H.R. 1133, 226 cosponsors. The Senate amended the pending crime bill, S. 1607, 103d Cong. (1993), to include the Violence Against Women Act, by a vote of 94 to 4, 139 Cong. Rec. 27,547 (1993), and then incorporated the bill into the House version, H.R. 3355, 103d Cong. (1993), which the Senate passed on November 19, 1993. 139 Cong. Rec. 30,588 (1993). The House initially passed the Violence Against Women Act as H.R. 1133 on November 20, 1993, by the unanimous vote of 421 to 0. 139 Cong. Rec. 31,337 (1993). On April 14, 1994, the House again passed the Act as part of a crime bill, H.R. 4092, 103d Cong. (1994), which the House then incorporated into H.R. 3355. 140 Cong. Rec. 8141-42 (1994).

[5] One issue was whether to include the civil rights remedy. To avoid potential opposition, the House Judiciary Committee dropped the civil rights provision from H.R. 1133 before reporting it favorably out of committee. *Compare* H.R. Rep. No. 103-395, at 1-24 (1993) ("1993 H.R. Rep.") (as amended), *with* H.R. 1133, Title III, § 301 (as introduced). The civil rights remedy was not included in the versions of the Act which initially passed the House; however, the provision was restored in Conference. *See* H.R. Conf. Rep. No. 103-711, at 385 (1994) ("H.R. Conf. Rep.").

further determined in both the statutory text, § 13981(a), and committee findings that it had the power to enact the provision pursuant to both the Commerce Clause, U.S. Const. art. I, § 8, and § 5 of the Fourteenth Amendment. For the reasons set forth below, that determination was correct.

SUMMARY OF ARGUMENT

This case is one of exceptional importance because it tests whether Congress has power to address significant national problems that it has determined obstruct interstate commerce and threaten principles of equality, and to which the states have proved unable to respond. The court of appeals held that the civil rights remedy of the Violence Against Women Act, legislation designed to address one such national problem, exceeded Congress' authority under both the Commerce Clause and § 5 of the Fourteenth Amendment. The court was in error.

In *United States v. Lopez*, 514 U.S. 549 (1995), and *City of Boerne v. Flores*, 521 U.S. 507 (1997), this Court invalidated acts of Congress because Congress failed to make the case for federal action. In *Lopez*, the Court struck down the Gun-Free School Zones Act in part because gun possession near schools had no evident connection to interstate commerce, and Congress had made no findings that would have aided the Court in evaluating the legislative judgment. Similarly, in *Boerne*, the Court found the Religious Freedom Restoration Act an impermissible legislative effort to redefine the meaning of the First Amendment because the legislative record failed to support a narrower, clearly legitimate aim of redressing laws that unconstitutionally discriminated against religious beliefs and practices.

1. The Violence Against Women Act civil rights remedy is different. After four years of exhaustive hearings, Congress made the specific findings and developed the extensive record lacking in the statutes recently invalidated by this Court. With respect to the Commerce Clause, Congress expressly found that gender-based violence substantially and directly affects interstate commerce by preventing a discrete group, women, from

participating fully in the day-to-day commerce of our nation. The legislative record reflects that gender-based violence denies women the opportunity to secure and maintain employment on an equal footing with men, exacting a heavy toll on the national economy and interstate commerce. Witness after witness testified that as a result of rape, sexual assault, or domestic abuse, she (or someone she knew) was fired from, forced to quit, or had abandoned her job. Violence against women and the threat of such violence, Congress also learned, robs women of the most basic attributes of commercial existence—the ability to go grocery shopping, patronize shopping malls and public accommodations, walk the streets, and use public transportation. Congress heard considerable testimony that gender-based violence likewise denies women the fundamental right to travel from state to state and to procure an education free from sexual assault.

In short, Congress reasonably determined that the singling out of women to bear the brunt of so many crimes of violence imposes an "artificial restriction on the market" that brings the problem within the federal ambit. As this Court long has recognized, Congress has power to remove obstructions to interstate commerce, whatever their source. In authorizing a civil cause of action for victims to vindicate their right to be free from violence motivated by gender animus, the statute continues, and is in keeping with, a venerable tradition of federal civil rights laws.

2. With respect to § 5 of the Fourteenth Amendment, Congress expressly found, and the record reflects, that widespread gender bias has led state criminal and civil legal systems to treat gender-based crimes of violence less seriously than other major crimes, denying victims the equal protection of the laws and the redress to which they are entitled. Congress found that state legal systems have institutionalized the historic prejudices against victims of rape or domestic violence by erecting formal and informal barriers to justice not encountered by victims of other serious crimes—barriers that many courts already have recognized violate the Equal Protection Clause.

The civil rights remedy is specifically designed to compensate for state violations of equal protection by putting directly into the hands of victims a legal tool that will enable *them* to secure the vindication and recompense too often denied them as a result of biased and unequal law enforcement in state legal systems.

The civil rights remedy was carefully crafted in the best spirit of cooperative federalism, undergoing many revisions on a bipartisan basis for the very purpose of minimizing the invasion into state prerogatives. Congress provided a civil remedy for victims that supplements, but does not displace, available state remedies, and one that minimally interferes with state sovereignty. Once Congress, after undertaking a careful investigation into a national problem of the first order, makes specific findings supporting the exercise of federal power and the congressional choice of remedy, its judgment is entitled to substantial deference.

ARGUMENT

I. THE CIVIL RIGHTS REMEDY IS A VALID EXERCISE OF CONGRESS' AUTHORITY UNDER THE COMMERCE CLAUSE.

The court of appeals acknowledged that "[t]he legislative record in this case, considered as a whole, shows that violence against women is a sobering problem and also that such violence ultimately does take a toll on the national economy." Pet. App. 68a. The court also agreed that "Congress' specific findings regarding the relationship between gender-motivated violence and interstate commerce . . . depict the manner in which such violence affects interstate commerce." *Id.* at 68a-69a. This recognition by the court of appeals should have ended the matter—but it did not.

Instead, the Fourth Circuit ruled that § 13981 fails under the Commerce Clause for two reasons. The court concluded first, that like the Gun-Free School Zones Act struck down in *United States v. Lopez*, 514 U.S. 549 (1995), the nexus to interstate commerce of the regulated activity (here, gender-based violence) is too attenuated, and second, that § 13981 fails to heed

principles of federalism. *Id.* at 31a-51a.

Neither of these conclusions is correct. As detailed below, § 13981 stands on firmer Commerce Clause ground, and is drafted in a manner more mindful of federalism concerns, than the statute invalidated in *Lopez*.

A. Congress Made Express Findings, Based on a Sufficient Record, That Gender-Based Violence Substantially Affects Interstate Commerce.

The Fourth Circuit claimed that it could "discern no . . . distinct nexus between violence motivated by gender animus and interstate commerce." Pet. App. 34a. Instead, the court accused the defenders of § 13981 of relying on an attenuated "costs of violent crime" rationale on a par with the one offered in *Lopez*. Because it failed to appreciate the differences between this case and *Lopez*, the court of appeals refused to give Congress' specific and detailed findings—which were predicated on an exhaustive supporting record—the proper deference they are due.

1. We have no quarrel with this Court's view in *Lopez* that congressional findings are important for courts "to evaluate the legislative judgment that the activity in question substantially affected interstate commerce," especially where, as was the case in *Lopez*, the connection between the activity and interstate commerce is not "visible to the naked eye." *Lopez*, 514 U.S. at 563. This Court invalidated the statute in *Lopez* in part because of Congress' failure to make the case for regulating gun possession near schools, conduct that in the Court's view, was neither economic in nature nor likely to exert a substantial effect on interstate commerce. *Id.* at 567. The same simply cannot be said of the Violence Against Women Act civil rights remedy. In sharp contrast to the Gun-Free School Zones Act, where Congress made no findings and the effect of the criminalized conduct on interstate commerce was comparatively trivial, § 13981 was the subject of numerous hearings and extensive findings by a Congress cognizant of the limits of its powers.

a. First, Congress explicitly found that gender-motivated violence against women substantially affects interstate

commerce. As the Conference Report stated:

> [C]rimes of violence motivated by gender have a substantial adverse effect on interstate commerce, by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved, in interstate commerce; crimes of violence motivated by gender have a substantial adverse effect on interstate commerce, by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products . . . .

H.R. Conf. Rep. 385.[6] Similar findings were made in Senate Judiciary Committee reports. The Committee found:

> Gender-based crimes and the fear of gender-based crimes restricts movement, reduces employment opportunities, increases health expenditures, and reduces consumer spending, all of which affect interstate commerce and the national economy. Gender-based violence bars its most likely targets—women—from full [participation] in the national economy.

1993 S. Rep. 54; *accord* 1991 S. Rep. 53; S. Rep. No. 101-545, at 43 (1990) ("1990 S. Rep.").

Second, while the Supreme Court in *Lopez* concluded that the relationship between gun possession near schools and interstate commerce was unduly attenuated, *Lopez*, 514 U.S. at 564-67, the connection between gender-based violence and interstate commerce is direct and confirmed by an ample legislative record. Congress heard testimony from dozens of

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[6] These findings were originally intended for the text of the statute, *see* S. 11, § 302(a), 103d Cong. (1993); 1993 S. Rep. 29, but were ultimately removed from the text to avoid cluttering the U.S. Code. Victoria F. Nourse, *Where Violence, Relationship, and Equality Meet: The Violence Against Women Act's Civil Rights Remedy*, 11 Wis. Women's L.J. 1, 36 (1996) (discussing the statute's legislative history).

victims and experts regarding the devastating impact of gender-based violence on the ability of women to participate in economic activities on an equal footing with men.

Congress determined that gender-based violence denies women an equal opportunity to compete in the job market, imposing a heavy burden on the national economy and interstate commerce. Witness after witness testified that as a result of rape, sexual assault, or domestic abuse, she (or someone she knew) was fired from, forced to quit, or had abandoned her job.[7] The Senate Judiciary Committee recognized "that almost 50 percent of rape victims lose their jobs or are forced to quit in the aftermath of the crime." 1993 S. Rep. 54. Those women who remain employed still face a period of decreased productivity, 1990 S. Rep. 33, with many missing work because they "either cannot leave their homes or are afraid to show the physical effects of the violence." *Id.* at 37. As a therapist at Polaroid Corp. testified, the battered women in his company's support group "identified a clear relationship between spousal abuse and such bottom-line issues as tardiness, poor job performance, increased medical claims, interpersonal conflicts in the workplace, depression, stress, and substance abuse." Feb. 1993 S. Hrg. 16 (James Hardeman).[8]

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[7] *See, e.g.*, 1994 H.R. Hrg. 15 (Pegi Shriver) (abusive husband caused her to lose her job); Nov. 1993 S. Hrg. 31 (Karen Gigey) (abusive husband caused her to lose job by hounding her at work); *id.* at 14 (Lisa) (after baby was born, husband did not allow her to go back to work); 1991 S. Hrg. 132-33 (Amy Kaylor) (rape led to her losing her job because of time missed from work); *id.* at 292-93 (letter from Dawn Bosshard) (employer fired her after she took medical leave following gang rape); 1990 S. Hrg., Pt. 1, at 27 (Marla Hanson) (sexual assault ended her modeling career); 139 Cong. Rec. 31,291 (1993) (Rep. Olver) (describing letter from victim of abuse who could not hold a job because of husband's harassment at work).

[8] The National Federation of Business and Professional Women, Inc. likewise testified: "Women who either cannot leave their homes or are afraid to show the physical effects of the violence will either forego employment opportunities available or jeopardize their current employment by absenteeism and poor work performance." 1991 S. Hrg. 241; *see, e.g.*, 1994 H.R. Hrg. 17 (Karla M. Digirolamo) (recounting how she "began missing more and more work"

As a result of such interference with the ability of women to work, domestic violence was estimated to cost employers between $3 and $5 billion annually as a result of absenteeism in the workplace.[9] Even the *threat* of gender-based violence, Congress found, adversely affects interstate commerce by deterring women from taking jobs in certain areas or at certain hours that pose a significant risk of such violence. 1993 S. Rep. 54.[10] For all of these reasons, "[i]n pure economic terms, the sheer loss of productivity attributable to violent gender-based assault is staggering." 1991 S. Hrg. 95 (Prof. Burt Neuborne).

The evidence before Congress illustrates countless other ways in which gender-based violence obstructs women's participation in economic life and their ability to move and travel freely. Congress heard from women who saw the most basic privileges of commercial existence—the ability to go grocery shopping, frequent shopping malls, walk the streets, and even mail correspondence—severely restricted by gender-based

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because her husband "kept [her] home or [she] was unable to leave because of the visible injuries [she] had sustained").

[9] 1991 S. Hrg. 240 (National Federation of Business and Professional Women, Inc.); *see also* 1994 H.R. Hrg. 9 (Vicki Coffey, Executive Director, Chicago Abused Women Coalition) ("Businesses lose billions of dollars annually due to absenteeism and loss of productivity because employees are abused.").

[10] *See* 1991 S. Hrg. 86 (Prof. Burt Neuborne) ("[W]omen who do enter the work force tend to choose their jobs with one eye looking over their shoulder about their safety. They can't work late like men can work; they can't work overtime; they can't take jobs in localities that are considered to be dangerous. Their employment opportunities have a ceiling placed upon them that you don't read in title VII."); *id.* at 92; *id.* at 240-41 (National Federation of Business and Professional Women, Inc.) ("Deprived of the ability to be safe in their own homes, to walk freely on the streets, and to travel alone without fear of attac[k], women find their employment options in life sharply reduced."); *see, e.g.*, 1990 S. Hrg., Pt. 1, at 22-23 (Nancy Ziegenmeyer) (rape victim gave up plans of becoming a real estate agent because "[t]he prospect of going into an unoccupied building with a stranger is terrifying to me" and now fears traveling and staying in lodging away from home).

violence.[11] Violence against women and the threat of such violence significantly impair women's freedom of movement and economic opportunities by deterring them from using public accommodations, sidewalks, streets, parking lots, and transportation—the very channels and instrumentalities of interstate commerce.[12] Congress found that because "fear of rape is central to the day-to-day concerns of about a third of women," it "takes a substantial toll on the lives of all women, in lost work, social, an[d] even leisure opportunities." 1991 S. Rep. 38.

As the legislative record also reflects, gender-based violence frequently denies women the basic right to travel from state to state, as spouses or boyfriends hunt them down or drive them from one jurisdiction to the next. One after another, witnesses described to Congress how they had become the interstate victims of abusive husbands or boyfriends who dragged the women from state to state to avoid detection of their crimes, or how the women themselves had fled across state lines to escape

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[11] *See, e.g.*, 1994 H.R. Hrg. 17 (Karla M. Digirolamo) (husband deprived her of money, forcing her to beg for food and money); Feb. 1993 S. Hrg. 15 (James Hardeman) (telling story of woman severely beaten on steps of post office because she had failed to get her husband's permission to leave the house and mail a letter); 1992 H.R. Hrg. 57 (Jane Doe) (husband allowed her "only to go to [her] job and come home and nowhere else"); 139 Cong. Rec. 31,292 (1993) (Rep. Olver) (submitting letter from abused woman prohibited by husband from going places, even grocery stores).

[12] "The threat of violence has made many women understandably afraid to walk our streets or use public transportation." 1990 S. Hrg., Pt. 2, at 80 (International Union, United Automobile, Aerospace & Agricultural Implement Workers of America—UAW); 1990 S. Hrg., Pt. 1, at 57 (Helen R. Neuborne, Executive Director, NOW Legal Defense and Education Fund) (describing self-imposed restrictions by female law school students who "routinely take precautions to protect themselves from the omnipresent threat of sex-based violence"). Women know that they cannot frequent places men can go without fear of attack. "Campuses, parking lots, libraries, shopping centers, parks, jogging trails—all are possible danger zones." 1991 S. Hrg. 253 (Dr. Leslie R. Wolfe, Executive Director, Center for Women Policy Studies); *see, e.g.*, Nov. 1993 S. Hrg. 41 (Jennifer Tescher) (after rape, could not bring herself to go out in public after dark).

their batterers.[13]

Finally, Congress learned that "[i]t is not unusual for a college woman victimized by rape, to drop out of school altogether. And, even if a woman does not drop out, she may feel it necessary to interrupt her college career simply to avoid her attacker." 1991 S. Hrg. 243 (National Federation of Business and Professional Women, Inc.). Indeed, the legislative record is replete with instances where abusive husbands prevented their wives from securing an education, or where, as is alleged here, a violent sexual assault impelled the victim to quit or transfer schools.[14] Brzonkala's own experience epitomizes the evidence before Congress—that gender-based violence causes women like Brzonkala to leave school, abandon jobs, or cease patronizing certain businesses and forms of public transportation. *See* Staff of Senate Comm. on Judiciary, *Violence Against Women: A Week in the Life of America* 9 (Oct. 1992) ("Violence against women affects everyday lives, imperils jobs, infects the workplace, ruins leisure time and educational opportunities.").

In short, the legislative record demonstrates all too clearly that gender-based violence "permeates every aspect of women's lives. It alters where women live, work, and study, as they try to be safe by staying within certain prescribed bounds," 1991 S.

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[13] *See, e.g.*, 1994 H.R. Hrg. 15 (Karla M. Digirolamo) (fled with child out of state); Apr. 1993 S. Hrg. 75 (Dr. John Nelson) (telling story of abused woman who had fled across seven states with her eighteen-month-old child when her husband tracked her down and shot the child in the head, killing him); 1992 H.R. Hrg. 55 (Jane Doe) (battered in four different states and seven different cities); 1990 S. Labor Hrg. 32 (Sarah M. Buel) (fled from New York to New Hampshire, and after husband hunted her down, moved virtually every year of son's fifteen years of life).

[14] *See, e.g.*, Nov. 1993 S. Hrg. 41 (Jennifer Tescher) (lost interest in school after rape in sorority house); 1991 S. Hrg. 132-33 (Amy Kaylor) (after rape, dropped out of school for a quarter and ultimately lost the funding for her college education); 1990 S. Hrg., Pt. 2, at 6 (Christine Shunk) (transferred schools after one rape, and flunked classes, delaying her graduation, after a second rape); 139 Cong. Rec. 31,291 (1993) (Rep. Olver) (describing letter from woman whose husband would not permit her to "get an education because he believed she would cheat on him or run away when she went to classes").

Hrg. 253 (Dr. Leslie R. Wolfe), relegating women to "a form of second-class citizenship." 1990 S. Hrg., Pt. 1, at 57 (Helen R. Neuborne). Thus, unlike the vague multi-step "cost of crime" rationale that this Court rejected in *Lopez*—where gun possession near a school might lead to violent crimes, which might adversely affect the learning environment, which might lead to a less productive citizenry, and which, finally, might have an adverse effect on the national economy—the connection between gender-based violence and interstate commerce is substantial and direct.

2. The court of appeals failed to appreciate, however, that the question is not whether it was satisfied that gender-based violence exerts these effects on interstate commerce, but instead, whether Congress' legislative judgment that it does, was rational, as it surely was. *See Lopez*, 514 U.S. at 563 (Court evaluates "the legislative judgment" that a particular activity substantially affected interstate commerce). This Court reaffirmed in *Lopez* that federal statutes enacted pursuant to the Commerce Clause remain subject to rational basis review. *Id.* at 557; *see also id.* at 568 (Kennedy, J., concurring) (counseling reviewing courts to exercise "great restraint"). Accordingly, a "court must defer to a congressional finding that a regulated activity affects interstate commerce, if there is *any rational basis* for such a finding." *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276 (1981) (emphasis added); *accord Preseault v. ICC*, 494 U.S. 1, 17 (1990).

Nowhere has this Court been more sensitive to Congress' discretion in exercising its broad Commerce Clause authority than when, as here, Congress has determined that a particular class of conduct obstructs a discrete group's participation in commercial intercourse and thus warrants a federal response. In *Katzenbach v. McClung*, 379 U.S. 294 (1964), for example, the Court sustained the application of Title II of the Civil Rights Act of 1964 to Ollie's Barbecue, a family-owned restaurant in Birmingham, Alabama, which served a local clientele. The Court relied on evidence before Congress establishing that race discrimination in restaurants had "a direct and highly restrictive effect" upon interstate travel and hindered interstate commerce

by affecting the volume of interstate goods sold and the success of local businesses. *Id.* at 300. Because Congress could find that racial bias by restaurants adversely affected commerce, the Court rejected the argument that Congress was required to include a provision compelling a case-by-case determination of the impact on interstate commerce. *Id.* at 303; *see also Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964).

Likewise, in upholding the extension of the Age Discrimination in Employment Act to state employers, this Court relied on the damaging economic impact of age discrimination, which "deprived the national economy of the productive labor of millions of individuals" and "inflicted on individual workers the economic and psychological injury accompanying the loss of the opportunity to engage in productive and satisfying occupations." *EEOC v. Wyoming*, 460 U.S. 226, 231 (1983). As the Court had put it in *McClung*: "this type of discrimination imposed 'an artificial restriction on the market' and interfered with the flow of merchandise." 379 U.S. at 299-300; *see also Daniel v. Paul*, 395 U.S. 298, 307 n.10 (1969) (recognizing that if "establishments narrow their potential markets by artificially restricting their patrons to non-Negroes, the volume of sales and, therefore, the volume of interstate purchases will be less") (citation omitted).

The same holds equally true for gender-based violence. As documented above, Congress found that such violence likewise "deprive[s] the national economy of the productive labor of millions" of women and inflicts on women severe and dislocating "economic injury" because of the loss of opportunity for women to engage fully in the activities that are the lifeblood of our national economy. The singling out of *women* to bear the brunt of so many crimes of violence imposes an "artificial restriction on the market" as serious as that presented by race discrimination in public accommodations and one that merits an equally serious federal response. *See* 1991 S. Hrg. 116 (Prof. Cass Sunstein) ("Congress could reasonably find . . . that the existence of sex-related violence 'overhangs the market,' in the sense that it discourages women from working in jobs and travelling to places

in which sex-related violence occurs."); *see Lopez*, 514 U.S. at 574 (Kennedy, J., concurring) (recognizing that Congress can regulate on the assumption that "we have a single market and a unified purpose to build a stable national economy").

Once Congress, after undertaking a careful investigation into a national problem of the highest order, makes specific findings justifying the exercise of its authority under the Commerce Clause, Congress' duty is discharged, its task complete, and its action entitled to a strong presumption of constitutionality.

B. Congress Deliberately Selected a Remedy That Respects Principles of Federalism.

This Court struck down the legislation in *Lopez* not only because of a perceived weakness in the link between gun possession near a school and commerce, but also because of concerns about the statute's intrusion into state prerogatives. Section 13981, by contrast, was narrowly drafted with the specific goals of minimizing any such invasion and maximizing cooperation between the federal and state governments in their fight against gender-based violence.

First, although the court of appeals' majority repeatedly referred to the civil rights remedy as a statute which "criminalize[s]" conduct, *e.g.*, Pet. App. 125a, that characterization is plainly incorrect. Section 13981 is a civil rights statute that authorizes a civil cause of action; it is *not* a criminal statute. Whereas, in the Court's view, the Gun-Free School Zones Act blurred the lines of political accountability and upset the federal-state balance by duplicating the criminal laws of more than 40 states barring the possession of firearms on or near school grounds, and by undermining innovative programs in many states designed to encourage the voluntary surrender of firearms, *id.* at 581-82 (Kennedy, J., concurring), § 13981 does no such thing. Unlike the gun possession statute, which added a "redundant layer of federal regulation in an area where most states had already acted," Pet. App. 276a (Motz, J., dissenting), § 13981 responds to the states' self-described needs without preempting or interfering with state prosecutions in any way. *See*

Part II, Section A(2), *infra* (describing state task force reports).

Equally important, in contrast to the Gun-Free School Zones Act, § 13981 does not invade any area of traditional state concern. In 1991, the federal and state judiciaries voiced concerns that the civil rights remedy would federalize domestic relations law and unduly burden both federal and state courts. *See* 1993 H.R. Hrg. 74-76 (1991 Report from the Judicial Conference of the United States); 1991 S. Hrg. 314-17 (Conference of Chief Justices); 138 Cong. Rec. 582, 583 (1992) (Chief Justice Rehnquist, 1991 Year End Report on the Federal Judiciary). Based on this same assumption that the provision would federalize many domestic disputes, the Administrative Office of the U.S. Courts predicted that the civil rights remedy would "significantly affect the courts and their administration" by generating as many as 53,800 civil tort cases annually, with a projected 13,450 annual case filings expected in the federal courts. 1991 S. Hrg. 15-16.

Congress responded to these concerns. In the spring of 1993, then-Chairman Biden and Senator Hatch took the lead in negotiating modifications to the civil rights remedy specifically to narrow its scope, preserve state spheres of authority, and minimize the statute's effect on domestic relations law. These bipartisan revisions were incorporated in the version of S. 11 reported favorably out of the Senate Judiciary Committee later that year. First, the Committee strove to preserve the states' voice in enforcing the new right to be free from gender-based violence by giving state courts concurrent jurisdiction to enforce the statute, § 13981(e)(3), and by barring the removal to federal court of any state court action asserting claims under § 13981. 28 U.S.C. § 1445(d); *compare* S. 11 (as introduced), *with* 1993 S. Rep. 30 (S. 11 as amended).

Second, the Committee carefully avoided supplanting state tort law by clarifying that to be "motivated by gender" within the meaning of the provision, a crime of violence not only had to be committed "because of gender or on the basis of gender," but it *also* had to be "due, at least in part, to an animus based on the victim's gender." § 13981(d)(1); *compare* S. 11 (as introduced),

with 1993 S. Rep. 30 (S. 11 as amended). Congress recognized that while women often are subject to violence for the same reasons as men (such as for robbery, burglary, larceny, and motor vehicle theft), "women also are victims of violence simply because they are women." 1991 S. Hrg. 262 (Dr. Leslie R. Wolfe). Accordingly, Congress drafted the statute specifically to target that gender bias; moreover, by enacting a civil rights statute that requires invidious discriminatory motivation, Congress also avoided creating "a general federal tort law." 1993 S. Rep. 51 (citing *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971)).

Third, the Committee limited the statute so that it did not reach even all violent crimes motivated by gender animus. Only the most serious offenses, felonies, now qualify as a "crime of violence" under the statute. § 13981(d)(2)(A); *compare* S. 11 (as introduced), *with* 1993 S. Rep. 30 (S. 11 as amended). Finally and most importantly, the Committee narrowed the civil rights remedy so as to deny federal courts supplemental jurisdiction over state law claims "seeking the establishment of a divorce, alimony, equitable distribution of marital property, or child custody decree." 42 U.S.C. § 13981(e)(4); *see also* 1993 S. Rep. 51 (the civil rights remedy "does not involve the Federal courts in divorce cases or domestic relations disputes"); 1991 S. Rep. 48.[15] Senator Hatch, as well as Senator Biden, was satisfied that Congress had been sufficiently sensitive to the important role of the states in addressing gender-based violence and that the revised provision struck the right balance between federal and state authority. *See* 139 Cong. Rec. 30,107 (1993) (Sen. Hatch) ("Despite some misconceptions, this measure does not make every sexual assault or rape a Federal offense. Rather, it recognizes that there is a proper role for the Federal Government

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[15] Perversely, the Fourth Circuit took this exclusion of federal jurisdiction over state family law to imply that § 13981 *does* federalize state family law. Pet. App. 46a. It is difficult to see how § 13981 *arrogates* jurisdiction to the federal courts over family law matters when the statute explicitly precludes such jurisdiction.

in assisting the States in fighting violence against women.").

After these significant changes were made to the civil rights remedy narrowing its reach, the Judicial Conference dropped its opposition. 1993 H.R. Hrg. 70-71 (Letter from Judge Stanley Marcus, Chairman, Ad Hoc Committee on Gender-Based Violence). State officials, moreover, far from worrying about any supposed federal intrusion into state affairs, actively *urged* Congress to pass the Violence Against Women Act, including its civil rights remedy.[16] Likewise, 33 Attorneys General have asked this Court to uphold the civil rights remedy because they "agree with Congress that gender-based violence substantially affects interstate commerce and the States cannot address this problem adequately by themselves." Amicus Brief of the States of Arizona, et. al. in Support of the Petition for a Writ of Certiorari, at 1. Significantly, the judiciary's concern about the potential impact of the statute on federal and state court case loads has not come to fruition. Although the precise number of cases filed is not known, there have been far fewer than one hundred reported cases asserting claims under § 13981 in federal court, and only a handful of reported cases in state court, since the statute's enactment in 1994.

Nor does § 13981, as the court of appeals feared, presage a new era of federal regulation of all crime, all domestic relations, and the like. *See* Pet. App. 89a. The statute simply represents an exercise of Congress' established power to remove obstructions to interstate commerce, whatever their source. *National Labor Relations Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 32, 37 (1937). As the vast majority of states have agreed, the problem of gender-based violence is national and interstate in nature, and

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[16] *See* 1993 H.R. Hrg. 34-36 (Letter from 41 Attorneys General urging Congress to pass the Violence Against Women Act, including its civil rights remedy, because "the problem of violence against women is a national one, requiring federal attention, federal leadership, and federal funds"); *id.* at 30-32 (National Association of Women Judges); 1991 S. Hrg. 37-38 (Resolution from the National Association of Attorneys General). *But see* 1993 H.R. Hrg. 77-84 (Conference of Chief Justices, expressing continued opposition to the civil rights remedy).

accordingly "transcend[s] the abilities of State law enforcement agencies." 1993 S. Rep. 62. When the states fail to solve a national problem with a substantial impact on interstate commerce, Congress is free and duty-bound to act.

II. THE CIVIL RIGHTS REMEDY IS A VALID EXERCISE OF CONGRESS' POWER TO ENFORCE THE FOURTEENTH AMENDMENT.

Congress also enacted § 13981 as a means of redressing formal and informal biases against the victims of gender-based violence that prevailed in state legal systems across the country. Congress' determination that such a remedy was appropriate to enforce the Fourteenth Amendment Equal Protection Clause is also entitled to great weight. As this Court recently reaffirmed: "It is for Congress in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference." *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (citation omitted).

Much as it did in *Lopez* with respect to the Commerce Clause, this Court held in *Boerne* and *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 119 S. Ct. 2199 (1999), that Congress was without power to enforce the Fourteenth Amendment without building a sufficient legislative record to justify its action. In *Boerne*, the Court held that by reinstating a standard of review for free exercise of religion claims not required by the First Amendment, the Religious Freedom Restoration Act impermissibly attempted to "alter[] the meaning of the Free Exercise Clause." 521 U.S. at 519. The Court rejected the claim that the statute advanced the narrower and clearly legitimate aim of redressing laws that unconstitutionally discriminated against religious beliefs and practices because "RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry." *Id.* at 530.

Similarly, in *Florida Prepaid*, the Court ruled that the Patent Remedy Act, which purported to abrogate the states' sovereign

immunity from claims of patent infringement, could not be construed to enforce the Due Process Clause because the Court found "little support for the proposition that Congress sought to remedy a Fourteenth Amendment violation" in enacting the statute. 119 S. Ct. at 2208. Searching the record in vain for the "evil" or "wrong" that Congress intended to remedy, the Court found that "Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations." *Id.* at 2207. In the absence of "evidence of massive or widespread violation of patent laws by the States," the Court concluded that Congress simply had "acted to head off [a] speculative harm." *Id.* at 2207-08.

By contrast, in enacting the Violence Against Women Act civil rights remedy Congress did much more—meeting the new challenges set for it by this Court's recent decisions. As described below, Congress identified and documented a "massive" and "widespread" pattern of equal protection violations by state actors, one that justified a federal response.

A. Congress Found Widespread Bias in State Legal Systems Against the Victims of Gender-Based Crimes, and Acted to Remedy That Bias.

Congress made specific findings justifying its enactment of § 13981 to enforce the Fourteenth Amendment. The Conference Report stated:

> State and Federal criminal laws do not . . . adequately provide victims of gender-motivated crimes the opportunity to vindicate their interests; existing bias and discrimination in the criminal justice system often deprives victims of crimes of violence motivated by gender of equal protection of the laws and the redress to which they are entitled . . . .

H.R. Conf. Rep. 385; *accord* 1993 S. Rep. 29 (same findings originally intended for the statutory text).

This considered congressional judgment, which the court of appeals dismissed out of hand as "legal boiler plate," Pet. App. 152a, was predicated on a considerable record documenting

systemic gender bias and self-described failures by the states to treat gender-based violent attacks with the same seriousness accorded other major crimes. As the evidence before Congress revealed, crimes against women traditionally have been perceived as anything *but* crime—"as a 'family' problem, as a 'private' matter, as sexual 'miscommunication.'" 1991 S. Rep. 37. Congress learned that state legal systems had remained captive to archaic, stereotyped notions of the "proper place" for women in the family and society—a legacy of the common-law "rule of thumb." Rooted in historic skepticism of the veracity and gravity of charges of rape, 1991 S. Rep. 44 (citing Lord Matthew Hale's 17th century jury instruction that rape is a charge "easily to be made and hard to be proved, and harder to be defended by the party accused, tho' ever so innocent"), official and institutionalized suspicion of victims of gender-based violence lives on, Congress determined, in the guise of formal and informal barriers to justice not braved by victims of other serious violent crimes. *Id.* at 44-48; 1993 S. Rep. 49-50, 55.

1. As Congress found when it enacted the Violence Against Women Act, many victims of rape and other sexual assaults enjoyed no legal recourse whatsoever under state law. For example, when the bill was first introduced in 1990, the majority of states either did not make marital rape a prosecutable offense or downgraded it by allowing the crime to be charged only when aggravating factors, not required in other cases of rape, were present. 1993 S. Rep. 47 & nn.42-44, 55; 1991 S. Rep. 45 & nn. 49-50. Even sexual assaults by former husbands or boyfriends were immunized in some states from prosecution. *Id.* at 45 n.50 (noting that some states had extended marital rape exemptions to "cohabitants and formerly married persons").

The marital rape exemption rests on "archaic notions about the consent and property rights incident to marriage" that "are simply unable to withstand even the slightest scrutiny." *New York v. Liberta*, 474 N.E.2d 567, 573 (N.Y. 1984) (holding that the marital rape exemption violates the Equal Protection Clause). The premise of the exemption is that "a woman was the property of her husband and that the legal existence of the woman was

'incorporated and consolidated into that of the husband.'" *Id.* (citation omitted). This premise reflects nothing but gender bias in one of its worse forms, as this Court has recognized in other contexts.[17] "Nowhere in the common-law world—indeed in any modern society—is a woman regarded as chattel or demeaned by denial of a separate legal identity and the dignity associated with recognition as a whole human being." *Trammel v. United States*, 445 U.S. 40, 52 (1980) (rejecting an absolute privilege against adverse spousal testimony). For this reason, many—but not all—courts have invalidated their states' exemptions or "downgrades" for marital rape or sexual assault as in violation of the Equal Protection Clause.[18]

State interspousal tort immunity doctrines further perpetuated archaic gender-stereotypes about the intrinsic "unity" of husband and wife. The Senate Judiciary Committee found that these doctrines erected yet another formal barrier to legal vindication for the victims of gender-based violence, this time in state civil legal systems. 1993 S. Rep. 55; 1991 S. Rep. 45. When Congress was considering the Violence Against Women Act, interspousal tort immunity barred women in ten states from suing her spouse under state tort law after a brutal attack. *See* 1990 S. Hrg., Pt. 1, at 64 (NOW Legal Defense and Education Fund). Not surprisingly, these laws frequently met the

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[17] *See, e.g., United States v. Virginia*, 518 U.S. 515, 534 (1996) ("[C]lassifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women.") (citation omitted); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982) ("Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions."); *Craig v. Boren*, 429 U.S. 190, 198 (1976) (Court has rejected "increasingly outdated misconceptions concerning the role of females in the home rather than in the 'marketplace and world of ideas'" and other "archaic and overbroad" generalizations).

[18] *See, e.g., Merton v. Alabama*, 500 So.2d 1301, 1305 (Ala. Crim. App. 1986); *Williams v. Alabama*, 494 So.2d 819, 830 (Ala. Crim. App. 1986); *Warren v. Georgia*, 336 S.E.2d 221, 226 n.11 (Ga. 1985); *Illinois v. M.D.*, 595 N.E.2d 702, 713 (Ill. App. Ct. 1992); *Shunn v. Wyoming*, 742 P.2d 775, 778 (Wyo. 1987).

same fate as their criminal counterparts, with many courts declaring them to be in violation of the Equal Protection Clause.[19] Still other legal requirements unique to crimes of sexual violence conspired to prevent women from bringing their attackers to justice. *See* 1993 S. Rep. 45-46; 1991 S. Rep. 44-47.

That some states have reformed these laws does not mean that all states have done so. A victim hardly should be forced to wait and suffer flagrant violations of her constitutional rights until an appropriate case comes along to present a state court with an opportunity to strike down an offending law[20] or until her state legislature is motivated to act—assuming that such action is even effective.[21] And neither should Congress.

2. In concluding that "[w]omen often face barriers of law, of practice, and of prejudice not suffered by other victims of discrimination," 1993 S. Rep. 49, Congress relied, in part, on two dozen studies by state task forces on gender bias. *See id.* at 49 & n.52; 1991 S. Rep. 34, 43-44 & n.40. Congress found that "[s]tudy after study has concluded that crimes disproportionately

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[19] *See, e.g., Moran v. Beyer*, 734 F.2d 1245, 1248 (7th Cir. 1984) ("[W]e cannot find it at all rational to believe that the Illinois legislature's desire to protect marital harmony is fulfilled by [the statute], which does little more than grant one spouse almost unconditional license to make his marriage partner a sparring partner. We are, therefore, compelled to declare it unconstitutional."); *see also Jones v. Jones*, 376 S.E.2d 674, 675 (Ga. 1989); *Burns v. Burns*, 518 So.2d 1205, 1211 (Miss. 1988); *Estes v. Estes*, No. WD-84-36, 1984 WL 14313, at *4 (Ohio. App. Oct. 19, 1984); *Hack v. Hack*, 433 A.2d 859, 868 (Pa. 1981); *Price v. Price*, 732 S.W.2d 316, 320 (Tex. 1987).

[20] Ironically, because of the requirement of Article III standing, *see Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), court challenges to marital rape exemptions have been beyond the victim's control. The validity of these exemptions generally have reached the courts when a defendant who could not claim the benefit of a state marital exemption challenged the exemption as denying *him* equal protection. *See, e.g., Liberta*, 474 N.E.2d at 569.

[21] Regrettably, Congress found that even when state legislatures have acted, implementation of victims' new rights has faltered. 1991 S. Rep. 46 ("The sad fact is that law reform has failed to eradicate the stereotypes that drive the system to treat these crimes against women differently from other crimes.").

affecting women are often treated less seriously than comparable crimes against men." 1993 S. Rep. 49; *accord* 1991 S. Rep. 43. "[C]ollectively," Congress concluded, "these reports provide overwhelming evidence that gender bias permeates the court system and that women are most often its victims." 1993 S. Rep. 49 (citation omitted); 1991 S. Rep. 43-44. Indeed, many state task force reports candidly admitted that gender bias was pervasive in their state legal systems.[22]

Congress perceived that an important reason state remedies have failed is "because legal rules and practices continue to shine a spotlight of suspicion on the victim." 1991 S. Rep. 44. Because of this "pervasive suspicion of rape victims' credibility," 1993 S. Rep. 45 (footnote omitted), courts, prosecutors, and law enforcement officers frequently require additional corroboration of victims' testimony, such as physical injuries, a prompt complaint, no prior contact with the defendant, and polygraph exams. *Id.* at 45-46; 1991 S. Rep. 44-47.

And "[a]s if the credibility issues were not burdensome enough, survivors must also face pervasive victim-blaming attitudes." 1991 S. Rep. 47. The Committee pointed to "the widespread belief that people who are raped precipitate in some way, whether it be by dress having a drink in a bar, accepting a ride in a car or accepting a date." *Id.* (quoting 1991 S. Hrg. 136 (Gill Freeman)). This entrenched "boys will be boys" / "she must have asked for it" mentality, 1993 H.R. Hrg. 8 (Sally Goldfarb, Senior Staff Attorney, NOW Legal Defense and Education Fund), is unique to gender-based violence. *See* Nov. 1993 S. Hrg. 48 (Julia Vigue, Rape Crisis Center) ("A double standard is very, very clear. Sex crime is the one area of criminality where we judge the offense not by the perpetrator but by the victim."). The notion that *women* cannot frequent bars,

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[22] *See, e.g.*, 1991 S. Hrg. 135 (Gill Freeman, Chair, Florida Supreme Court Gender Bias Study Implementation Commission); Administrative Office of the California Courts Judicial Council, *Achieving Equal Justice for Women and Men in the Courts* 5 (1990); Supreme Court of Georgia, *Gender and Justice in the Courts* 1 (1991); Texas Gender Bias Task Force, *Final Report* 72 (1994).

accept a car ride or a date, or go out late at night without assuming the risk of a violent sexual assault, is gender bias, plain and simple. This assumption that the woman had precipitated or "asked for" the attack boded particularly poorly for the victims of "acquaintance rape," which, as Congress learned, state prosecutors routinely refused to prosecute. 1991 S. Rep. 47.[23]

As further evidence of "the puzzling persistence of public policies, laws, and attitudes that treat some crimes against women less seriously than other violent crimes," 1991 S. Rep. 33, witness after witness gave painful testimony regarding the unwillingness of too many state police officers, prosecutors, and even judges, to treat domestic abuse as the egregious crime that it is,[24] leading Congress to conclude that "[g]ender bias

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[23] *See, e.g.*, 1993 H.R. Hrg. 9 (Sally Goldfarb) (reporting that the Oakland, California police department closed over 200 rape cases with little to no investigation because they involved prostitutes and drug users, as well as acquaintance rapes); 1991 S. Hrg. 137 (Gill Freeman) (reporting that prosecutors in Florida are unwilling to pursue acquaintance rape cases).

[24] As one prosecutor observed, "Police work on domestic cases generally reflect[s] the officers' attitude toward these cases: That they are unimportant and that they will go nowhere." 1992 H.R. Hrg. 70 (Margaret Rosenbaum, Assistant State Attorney); *see, e.g.*, 1994 H.R. Hrg. 18 (Karla M. Digirolamo) (police came when husband was kicking her while pregnant and told them "to keep it down" and went on their way); *id.* at 119-20 (Donna Lawson) (bereaved mother recounts the refusal of police to respond to daughter's boyfriend's daily ritual of forcing her daughter's car off the road, until finally, he killed her); Nov. 1993 S. Hrg. 15 (Lisa) (after husband stabbed her in the back and drove down the road dragging her from his truck, police commented that it looked like a "push/shove match" had taken place and did nothing); Apr. 1993 S. Hrg. 12 (Loretta Baca) (police officer asked her why she was filing charges against boyfriend for assault, given that she was "a Hispanic female and that was part of [her] culture," and prosecutor decided that "the only reason" she was filing charges was because she was "mad" at the boyfriend and was "probably already talking to him and sleeping with him"); *id.* at 82 (Barbara Wood, Executive Director, Turning Point) (battered women often told by officers that they cannot arrest the husband because "he might lose his job and that wouldn't be fair"); 1992 H.R. Hrg. 33-35 (Vivian Downing) (husband who shot her in the neck, leaving her a quadriplegic, was never prosecuted); *id.* at 57-58 (Jane Doe) (when police finally responded to call, they told her that if she wanted to keep her children, she should return to the house and "work everything out");

contributes to the judicial system's failure to afford the protection of the law to victims of domestic violence." 1993 S. Rep. 46. Even civil protection orders, when domestic violence victims could obtain them, were of little use because of state officials' reluctance to enforce them.[25] Still others attested to the official predisposition to discredit, blame, or stereotype the victims of rape or sexual assault for their attacks.[26] The inaction in this case of Virginia Tech, a state entity, was unfortunately, all too typical.

1990 S. Labor Hrg. 6 (Mary Pat Brygger, National Woman Abuse Prevention Project) (study found that in 90% of domestic homicides, police had been called to the home at least once, and in more than 50% of the cases, five or more times); *id.* at 27 (Annette Stewart) (police responded to call and then left while husband was beating her up because husband told police they were only having a "domestic squabble"); *id. at* 77 (Barbara Zeek-Shaw, Project Safeguard) (judge berated a pregnant battered woman requesting a restraining order for "wasting the court's time" and told her she "should act more like an adult"; her husband subsequently beat, strangled, shot, and killed her).

[25] *See, e.g.*, Feb. 1993 S. Hrg. 31, 33 (Rep. Barbara Gray) (restraining orders not treated seriously); 1990 S. Labor Hrg. 28 (Annette Stewart) (police would not enforce her protection order); 1990 S. Hrg., Pt. 2, at 99 (Tracy Motuzick) (police refused to enforce restraining order against abusive husband, who ultimately stabbed her thirteen times and broke her neck, leaving her paralyzed); 139 Cong. Rec. 31,291-92 (1993) (Rep. Olver) (describing letter from victim who had received 13 restraining orders against her husband, who was not charged with over 200 counts of violating them).

[26] *See, e.g.*, 1993 S. Rep. 46 (citing Louisiana sheriff's response to scene in which an attacker had shoved a screwdriver three inches into the victim's stomach and raped her, that "the victim must have 'incited' or 'provoked' the attacker"); 1992 H.R. Hrg. 40 (Jennifer Katzoff) (in response to her reported rape, campus security told her that because she had opened the door and had not screamed, that she "had asked for it, and that it was [her] fault"); 1991 S. Hrg. 63 (Roland W. Burris, Attorney General of Illinois) (judge dismissed a rape charge because the victim said that the attack took place at 10 a.m. because he believed that no one would break into an apartment in the daylight, with the shades up, and risk being seen by neighbors); *id.* at 293 (letter from Dawn Bosshard) (state authorities told victim of gang rape that there was nothing they could do, and one official asked her, "Isn't it your fantasy to be raped by four guys!").

Given this "double victimization" of women—first at the hands of the attacker, and then, at the hands of the legal system—it should come as no surprise that, as Congress found, "[m]any of those crimes are never reported, fewer are prosecuted, and even fewer result in a conviction." 1990 S. Rep. 42; *see also* 1993 S. Rep. 42; 1993 H.R. Rep. 25-26. Victims fared no better in state civil justice systems. Although sexual assault is a tort in every state, one study found that only 255 civil jury trials in sexual assault cases had been conducted *over a ten-year period* and that fewer than one percent of all victims had collected compensatory damages. 1991 S. Rep. 44 & n.43.

3. As a result of the overwhelming evidence of bias in state legal systems, Congress was compelled to conclude: "From the initial report to the police through prosecution, trial, and sentencing, crimes against women are often treated differently and less seriously than other crimes." 1993 S. Rep. 42. Such institutionalized and sweeping disregard for victims of gender-based violence can hardly be dismissed as negligent or inadvertent. *See* Pet. App. 153a-155a. While a state may have no affirmative constitutional duty to protect its citizens absent some "special relationship," *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989), a state "may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause." *Id.* at 197 n.3. It is clear that "[d]iscrimination in providing protection against private violence [can] violate the equal protection clause of the Fourteenth Amendment." *Bowers v. Devito*, 686 F.2d 616, 618 (7th Cir. 1982).

Thus, § 13981 "takes aim at gender-discrimination of the type for which the 14th amendment provides heightened scrutiny." 1993 S. Rep. 55. As Congress properly concluded, in no case does it have greater power to legislate to enforce the Fourteenth Amendment than when, as here, "the criminal justice system is not providing equal protection of the laws [to] women in the classic sense." *Id.* (citing 1991 S. Hrg. 105 (Prof. Cass Sunstein)); *see also* 1993 H.R. Hrg. 96 (James P. Turner, Acting Assistant Attorney General) (the legislative record demonstrates

"a classic denial of equal protection").

B. Congress' Choice of Remedy in Responding to the Failings of State Legal Systems Was Appropriate.

Finally, this Court has required legislation enforcing the Fourteenth Amendment to display "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997). Relying on *Boerne*, the Fourth Circuit denounced the civil rights remedy as both under- and over-inclusive and thus lacking in both "congruence" and "proportionality." Pet. App. 157a-160a. Congress is entitled to greater latitude than that allowed by the court of appeals.

Section 13981 is calibrated precisely to address the constitutional violation that Congress had identified—the states' systemic failure to afford victims of gender-based violence an opportunity to vindicate their rights on a par with other victims of serious violent crime. Indeed, § 13981 is the *only* provision in the Violence Against Women Act that directly empowers these victims. As Congress explained: the civil rights remedy "puts another legal tool in victim's hands to call their attacker to account. Testimony before the committee shows that such remedies are important because they allow survivors an opportunity for legal vindication that the survivor, not the State, controls." 1990 S. Rep. 42; *see also* 1993 H.R. Hrg. 3 (Sally Goldfarb); 1991 S. Hrg. 105 (Prof. Cass Sunstein); *id.* at 85-86 (Prof. Burt Neuborne).

Nonetheless, the court of appeals condemned the statute first, for not directly regulating the states themselves. Pet. App. 44a-45a, 157a. Yet Congress was not required, as the court suggested, to enact a far more sweeping and intrusive remedy for state failings, such as by preempting the states' criminal and tort laws altogether,[27] authorizing law suits directly against states or

[27] Congress deliberately struck a careful balance between directly preempting discriminatory state laws, such as the marital rape exemption, and indirectly codifying such bias. Thus, by design, § 13981 includes within its definition of "crime of violence" those acts that would constitute a federal or state felony *but for the relationship* between the perpetrator and the victim; in other words, if a man committed what, under state law, would amount to a "crime of violence" but for the fact that the victim was his wife, § 13981 would furnish a remedy. § 13981(d)(2)(B). For the same reasons, Congress ensured that the commission of a qualifying "crime of violence" under the statute did not turn on whether the crime *actually* had led to criminal charges, prosecution, or conviction, § 13981(d)(2)(A), because Congress intended to redress the unequal enforcement of such crimes in state legal systems, not validate it.

their officials, extending federal jurisdiction over family law matters, denying states concurrent jurisdiction over actions brought under § 13981, or by regulating *all* violence against women, regardless of the presence or absence of gender-based animus. *See* Pet. App. 44a-45a, 89a, 131a-132a. What the court of appeals saw as the statute's vice is actually its virtue: that Congress did none of these things underscores the care with which it crafted the civil rights remedy so as not to displace state laws or burden state functions. That Congress could have gone farther than it did, and taken action far more invasive to state sovereignty, is no reason to find the civil rights remedy void for lack of "congruence."[28]

To hold otherwise would be to force Congress to take action that it knew to be as impractical and unwise, as it would be punishing to the states. Congress had no intention of assuming control over all of family law so that it could address the specific problem of gender-based violence. Similarly, Congress is without power to require the states to enact new laws more to its liking. *See New York v. United States*, 505 U.S. 144 (1992). The Fourteenth Amendment does not limit Congress to creating

[28] *Cf. Preseault v. ICC*, 494 U.S. 1, 18-19 (1990) ("[W]e are not at liberty . . . to hold the [statute] invalid merely because more Draconian measures—such as a program of mandatory conversions or a prohibition of all abandonments—might advance more completely the [congressional] purpose."); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 290 (1981) ("Congress could constitutionally have enacted a statute prohibiting any state regulation of surface coal mining. We fail to see why the Surface Mining Act should become constitutionally suspect simply because Congress chose to allow the States a regulatory role.").

undesirable or unrealistic causes of action directly against the states or their agents. Instead of penalizing the states, Congress adopted the private attorney general model, in which private individuals sue to vindicate their rights while, at the same time, motivating states to do a better job of protecting those rights. *See City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986).

Section 13981's alleged overbreadth is also no constitutional defect. The court of appeals determined that the statute's remedy was "out of proportion" to any possible unconstitutional state action because it reaches all victims of gender-based crimes, all defendants who commit such crimes, and all states, without regard to the adequacy of their laws and enforcement efforts. Pet. App. 160a-161a. Yet it was reasonable for Congress to conclude that to require an individualized showing of state constitutional violations in each and every case would have imposed an undue—and likely impossible—burden of proof on the very victims whose access to the legal system Congress intended to ease, not restrict.

Such discretionary choices are in keeping with Congress' prophylactic power to effectuate the purposes of the Fourteenth Amendment. The remedy Congress selected corresponded to the nature of its findings: Congress found an across-the-board failure by states to provide equal protection to the victims of gender-based violence and responded by enacting an across-the-board remedy to permit those victims to bypass the state systems that too often had failed them.

CONCLUSION

As this Court recently recognized, "Our national experience teaches that the Constitution is preserved best when each part of the Government respects both the Constitution and the proper actions and determinations of the other branches." *City of Boerne v. Flores*, 521 U.S. 507, 535-36 (1997). Proper respect for the prerogatives of Congress requires that this Court uphold the constitutionality of the Violence Against Women Act civil rights remedy. Accordingly, Senator Biden respectfully urges this Court to reverse the judgment of the court of appeals.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, PETITIONER

V.

ANTONIO J. MORRISON, ET AL., RESPONDENTS

CHRISTY BRZONKALA, PETITIONER

V.

ANTONIO J. MORRISON, ET AL., RESPONDENTS

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

BRIEF OF LAW PROFESSORS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF THE *AMICI CURIAE*

This case brings into play two of our basic constitutional commitments: first, to a federal system that both guarantees the States a major role and gives Congress broad responsibility over interstate commerce, and second, to a nationwide guarantee that all persons enjoy the equal protection of the laws. Amici, law professors (identified in an addendum below) who teach and write about constitutional law, the federal courts or jurisprudence, will discuss how the Violence Against Women Act (VAWA) civil rights remedy is an apt response to the combined demands of these constitutional commitments.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

In 1994, Congress enacted VAWA, a multi-faceted statute responding to the inequality that women victims of violence encounter in state justice systems and to the economic injuries that this violence creates. The statute provides funding to the states for criminal law enforcement against perpetrators of violence, and for a variety of other assistance. *See generally* 42 U.S.C. §§13931-14040. The provision at issue here, Section 13981, creates a new federal civil rights remedy for victims of violence resulting from "animus based on the victim's gender."

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[1] Consent has been given by the four parties to amici to file this brief. In accord with Rule 37.6, no counsel for a party has authored the brief in whole or in part nor has any one but amici and their counsel funded its preparation and submission.

Unlike recent legislation invalidated by this Court, the new civil rights remedy was enacted after four years of deliberate congressional consideration of the ways violence against women implicated two of Congress' basic constitutional responsibilities: to protect interstate commerce and guarantee equal protection. Much of the evidence came from state officials, and specifically state judiciaries, which reported that state and local police, prosecutors and judges were not yet providing equal protection for women. Congress responded with substantial funding resources for the states, but concluded that a supplemental civil rights remedy was also necessary. This provision was drafted and redrafted to respond to concerns of both state and federal judges that state courts remain the adjudicators of domestic relations law. Congress narrowed the statutory cause of action to the most serious offenses, prohibited supplemental jurisdiction over any state law claims involving divorce, alimony or child custody, and denied removal of state claims. *See* 42 U.S.C § 13981(d), (e)(1), (4); 28 U.S.C. § 1445 (d).

Creation of this civil rights remedy is well within Congress' powers under the Commerce Clause and the Fourteenth Amendment. It is respectful of the federalism principles articulated by this Court in *United States v. Lopez*, 514 U.S. 549 (1995) and *City of Boerne v. Flores*, 521 U.S. 507 (1997). It is consistent with long-established constitutional allocations of powers to the federal courts and the Congress. It should be upheld.

I. The national government has power, under the Commerce Clause, to protect interstate and foreign commerce from injurious obstructions, whatever their source, so long as the regulated activities "substantially affect" commerce. *Lopez*, 514 U.S. at 559; *see NLRB v. Jones & Laughlin Steel Corp.*,

301 U.S. 1, 37 (1937). Since the 1960s, this Court and the Congress have recognized the need to protect the national economy from the injurious effects of discrimination that disable members of historically subordinated groups from participating fully in national economic life. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964). Congress called on this power to enact VAWA.

Through its many hearings, Congress identified specific harms to interstate commerce that amply satisfied the *Lopez* requirement of a "substantial effect" on interstate commerce. Extensive evidence from business organizations, mental health professionals and individuals made plain that the special hazards of violence faced by women limited their choices, affecting the jobs women took, and the times, hours, and places they worked. Violence against women harmed the national economy in terms of workplace productivity, the dollars lost to absenteeism, and health care costs. The record fully supports the conclusion that violence against women "restricts movement [and] reduces employment opportunities."[2]

Unlike the statute in *Lopez*, VAWA's civil remedy is based on a well-identified and substantiated need to protect commerce from the injurious effects of an environment of violence against a "quasi-suspect" class of persons, women, long treated by law and still treated by many as less than fully deserving of participation in economic life. Congress' approach is limited; it made no claim to general police powers nor did it "federalize" criminal or tortious acts based on some speculative and remote economic impact.

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[2] S. Rep. No. 103-138, 54-55 (1993).

In reviewing the extensive factual basis established for congressional action, the Court must take care not to initiate a new era of judicial second-guessing of matters properly for the legislature. Such an enterprise has no limits or boundaries. Rather than embark on a boundless oversight role, this Court should respect Congress' decision to protect the Nation's economy from injuries that spring from gender-based threats of violence.

II. Congress' extensive record demonstrates that state criminal justice systems deny women equal protection of the laws in the most fundamental sense: States fail to treat violent assaults against women as seriously as they treat violent assaults against men. Until recently, states regulated rape and domestic violence in explicitly sex-based terms; and Congress learned that this understanding of rape and domestic violence as assaults on women remains pervasive. Numerous witnesses and studies commissioned by the state judiciaries reported that official responses to violence continue to be shaped by stereotypical thinking. From the initial report to the police through prosecution, trial and sentencing, state actors take crimes against women less seriously than other crimes. This differential treatment violates the core command of the Equal Protection Clause: that women are entitled to the same protection from assault as men enjoy.

In creating VAWA's civil rights remedy, the Congress sought to enforce -- not to revise -- the core guarantees of the Equal Protection Clause. The exercise of this enforcement power raises none of the concerns addressed in *City of Boerne v. Flores*. The basic purpose of the Court's proportionality test was to prohibit pretextual uses of the enforcement power. Where there is no evidence of pretext, Congress's remedial powers under the Fourteenth

Amendment are broad and Congress is entitled to "wide latitude" to design effective remedies. *See Boerne*, 521 U.S. at 520.

Congress' decision to create a civil remedy is consistent with its larger purpose in enacting VAWA: to work in partnership with the States to eradicate historic forms of bias against women. Creating new damage or injunctive remedies against the states or their officers might have discouraged federal-state cooperation and interfered with the everyday administration of criminal justice. By contrast, VAWA's narrowly crafted civil remedy encourages state and local governments to work with victims of gender motivated violence, leaving states as the primary guarantors of protection of their citizens from violent assaults.

ARGUMENT

I. VAWA Is An Appropriate Exercise of the Commerce Clause Power to Protect the Nation's Economy From Injuries Resulting From Violence Directed At Women.

This Court recognizes that Congress does not have a general police power. It cannot regulate simply because of a remote or slight relationship between a local activity and the national economy. *United States v. Lopez*, 514 U.S. 549 (1995). But Congress can fully protect interstate and foreign commerce from injurious obstructions as long as the regulated activities have a substantial effect on commerce. In its "watershed case"[3] of *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), this Court concluded that Congress' Commerce Clause "power is plenary and may be

[3] *United States v. Lopez*, 514 U.S. 549, 555 (1995).

exerted to protect interstate commerce 'no matter what the source of the dangers which threaten it.'" *Jones & Laughlin*, 301 U.S. at 37 (citing *Second Employers' Liability Cases*, 223 U.S. 1, 51). Acting under this authority, Congress has long protected the Nation's economy from the injurious effects of discrimination against racial minorities and women.

A. The Commerce Clause Empowers Congress To Protect The Economy From Injuries Stemming from Discrimination.

By the 1960s, both the Congress and the Court came to understand that one "'source of the dangers which threaten'" commerce, *Jones & Laughlin*, 301 U.S. at 37, is discrimination. *See Heart of Atlanta Motel v. United States*, 379 U.S. at 257; *Katzenbach v. McClung*, 379 U.S. at 300-01. The Court did not uphold the challenged anti-discrimination laws because of the "insignificant" amounts of food purchased in interstate commerce, *McClung*, 379 U.S. at 300-01, but because systematic, invidious discrimination itself harms interstate commerce.[4] This same power provides ample constitutional foundation for the civil rights remedy of VAWA.

In affirming Congress' leading role in addressing such discriminatory barriers, the Court described the record before Congress as "replete with testimony of the burdens placed on interstate commerce by racial discrimination in

[4] As the Court noted, the "absence of direct evidence connecting discriminatory restaurant service with the flow of interstate food [on which appellees had relied], given the evidence as to the effect of such practices on other aspects of commerce" was not crucial. *McClung*, 379 U.S. at 304-05.

restaurants," including lowered per capita spending by the victims of the discrimination, the effect of discrimination in discouraging travel, and the deterrence to professional and skilled people moving into areas where such practices occurred. *McClung*, 379 U.S. at 299-300. Likewise, *Heart of Atlanta Motel* upheld the statute because of the "overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse." 379 U.S. at 257. As the Court explained,

> "It was this burden which empowered Congress to enact appropriate legislation, and given this basis for the exercise of its power, Congress was not restricted by the fact that the particular obstruction to interstate commerce . . .was also deemed a social and moral wrong." *Id.*

This history, recognized in *Lopez*, confirms that Congress has the power to protect the national economy from the injurious effects of pervasive discrimination that blocks historically subordinated groups from equal participation in national economic life. This well-settled constitutional doctrine is now woven into the fabric of our national life and public commitments.

B. Congress Acted On A Compelling Record Showing Direct and Substantial Injuries to Commerce.

The evidence before Congress reflected a pattern of gender motivated violence that was part of a framework of law and practice discriminating against women persisting into the modern era.[5] In hearings around the country,

[5] For example, state laws prohibited women from entering particular

congressional committees learned how such violence prevents women from competing with men for jobs and income in the marketplace.

Several organizations presented data detailing the barriers. James Hardeman, a Manager in the Polaroid Corporation, described the workplace disruption and poor job performance caused by violence against female employees. He explained how the creation of workplace-based counseling groups responded to battering -- when violence against women stopped, women "secured better jobs" in the company.[6]

The President of the National Federation of Business and Professional Women (a bipartisan organization of 120,000 members) described the "enormous" "costs in lost employment opportunities" to women victims of violent assault:

> "Violent crimes committed against women employees directly impact their ability to perform at work, their absenteeism rates and the medical benefit costs to the employer. . . .[W]omen find their employment

professions, *see, e.g.*, *Goesart v. Cleary*, 335 U.S. 464 (1948) (upholding state law excluding women from bar-tending) and provided legal preferences to husbands over wives in various capacities, *see, e.g.*, *Reed v. Reed*, 404 U.S. 71 (1971) (invalidating preference for male over female executors). For discussion of sex-based laws regulating sexual assaults, see *infra* at 18-23.

[6] *See Hearing on Domestic Violence: The Need to Concentrate the Fight Against an Escalating Blight of Violence Against Women, Hearing Before the Senate Comm. on the Judiciary*, 103d Cong. 16 (Feb. 1, 1993) (statement of James Hardeman, Manager, Counseling Department, Polaroid Corp.) [hereinafter *Senate Hearing 1993*]

> options in life sharply reduced."[7]

See also Senate Hearing 1993 at 241 (discussing constraints on women's employment because of fear of violence when using public transportation). The Federation also detailed the high rates at which raped women left their jobs, how men prevented women from leaving their homes to go to work, and how violence against college-aged women impaired their ability to pursue an education, thereby reducing their economic opportunities.[8]

[7] *Violence Against Women: Victims of the System, Hearing on S. 15 Before the Senate Comm. on the Judiciary*, 102d Cong. 239-41 (Apr. 9, 1991) (statement of Elizabeth Athanasakos, National President, National Federation of Business and Professional Women, Inc.) [hereinafter *Senate Hearing 1991*]

[8] Congress also received evidence that as many as 3-4 million women a year were victims of domestic violence, 137 Cong. Rec. H. 20, 29230 (1991) (Rep. McDermott), and that survey data showed that 9.3% of abused women reported taking time off from their jobs because of domestic violence. *See Senate Hearing 1991*, *supra* note 7, at 240 (statement of National Federation of Business and Professional Women). *See also* S. Rep. No. 102-197, at 53 (1991) (noting studies reporting that almost 50% of rape victims lose their jobs or must quit because of the severity of the crime).

Many victims of sexual assault reported difficulties in keeping or finding employment.[9] The Commission on the Status of Women of New York City reported that

> "The economy, and therefore everyone's standard of living are affected in numerous ways when women are the victims of violence. . .when women do not accept jobs because they fear the hours they would need to work would be too risky . . ."[10]

Congress learned of other adverse effects on the national economy. The National Federation of Business and Professional Women emphasized the substantial adverse effect of violence against female employees on small businesses.[11] Witnesses estimated that businesses lost $3-5 billion annually "due to absenteeism" and loss of productivity related to violence against women.[12] Physicians testified, for example, that at least 37% of female hospital

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[9] *See, e.g., Senate Hearing 1991*, supra note 7, at 131-33 (testimony of Amy Kaylor, from Toledo, Ohio); *Violence Against Women: Fighting the Fear, Examining the Rise of Violence Against Women in the State of Maine and Other Rural Areas, Hearing Before the Senate Comm. on the Judiciary*, 103d Cong. 13-17 (Nov. 12, 1993) (testimony of Lisa); *Violence Against Women, Hearing Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 102d Cong. 55-58 (Feb. 6, 1992) (testimony of Jane Doe of New York City) [hereinafter *1992 House Subcomm. Hearing*].

[10] *1992 House Subcomm. Hearing*, *supra* note 9, at 116 (statement of New York City Commission on the Status of Women); *see id* at 117 (also noting harm to economy when women "cannot work because of possessive/abusive spouses, or they are limited to working in places where the spouse can maintain control or contact").

[11] *Senate Hearing 1991*, *supra* note 7 at 239-40.

[12] *See id.* at 240; *Women and Violence, Hearing Before the Senate Comm. on the Judiciary*, 101st Cong. 58 (Jun. 20, 1990) (statement of Helen R. Neuborne, Exec. Dir., NOW Legal Defense & Educ. Fund).

emergency room cases are due to abuse, and Representatives learned of the Surgeon General's conclusion that "battery is the single largest cause of injury among women."[13] Health care costs, by some estimates, were $5-10 billion per year.[14]

In sum, as the Senate Judiciary Committee reported, the prevalence of violence against women in the United States "restricts movement [and] reduces employment opportunities" for women. S. Rep. 103-138, at 54 (1993).[15] The conclusion Congress reached—that violence against women, directed at them as women, harms the national economy by preventing women's equal participation, *id*—is one that should come as no surprise to this Court, which has reviewed the harmful effects of gendered violence in a variety of settings.[16]

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[13] *See Violent Crimes Against Women: The Problems of Violence Against Women in Utah and Current Remedies, Hearing before the Senate Comm. on the Judiciary*, 103d Cong. 74 (Apr. 13, 1993) (statement of Dr. John Nelson, Deputy Director, Utah Dept of Health); *1992 House Subcomm. Hearing*, *supra* note 9 at 1 (statement of Rep. Schumer).

[14] Majority Staff Report, Senate Comm. On the Judiciary, 103d Cong., 1st sess., *The Response to Rape: Detours on the Road to Equal Justice* 14 (Comm. Print S. 103-147, 1993) (citing article in American Medical News).

[15] *See* H.R. Conf. Rep. No. 103-711, at 385 (1994) (violence against women "deter[s] potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business . . . in interstate commerce" with "substantial adverse effect on interstate commerce. . . diminishing national productivity [and] increasing medical and other costs").

[16] *See, e.g., Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986) (sexual harassment in workplace); *Davis v. Monroe County Bd. of Educ.*, 119 S. Ct. 1661 (1999) (assaultive behavior toward schoolgirl). In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), the Court noticed the relationship between women's freedom from physical violence in the most intimate spheres of their lives and their ability to participate with

C. Upholding VAWA Will Open No Constitutional Floodgates Because, In Contrast to *Lopez*, Congress Sought To Advance A Traditional Federal Interest -- Freeing Commerce From Injuries Inflicted By Specific Patterns of Discriminatory Conduct.

Lopez does not question Congress' power to identify and respond to obstructions to commerce. The Gun Free School Zones Law invalidated in that case was the subject of a single hearing, at which constitutional questions about Congress' power were raised but not addressed. The government's brief did not suggest that Congress had actually considered the relationship between schoolyard violence and the national economy.[17] And the government defended the statute with a generic 'cost of crime rationale' that provided no way to delimit the range of permissible exercises of the federal commerce power over crime.

In contrast, when enacting VAWA, Congress undertook a serious effort at determining the economic effects of harms from discrimination, an area in which federal regulatory power is well-established. The legislative record leaves no doubt that Congress had a more than

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equality in the national economy, striking down a spousal notification provision in part because of its potential for violence. This Court explained that "for two decades of economic and social developments" people had made choices in reliance on the availability of abortion, and that women's "ability . . . to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Id.* at 856.

[17] *See* Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 Harv. L. Rev. 2180, 2239 & n. 255 (1998) (describing congressional record and Government's Brief in *Lopez*).

"rational" basis on which to conclude that violence against women had very substantial effects on interstate commerce. The detailed findings and extensive legislative record make more than plain to the "naked eye," *Lopez,* 514 U.S. at 563, the injurious effects to the national economy resulting from past failures to deter, prevent and penalize violence against women.

Unlike the broadreaching relationship between violence and the economy asserted in *Lopez*, VAWA addresses a circumscribed arena. The direct effects of violence against women on their participation in the national economy were thoroughly documented—grown women lost jobs, time from work, economic opportunities. By contrast, the link between gun possession near schools to the national economy seemed remote to this Court, built on a long chain of assumed events.

Upholding VAWA will not "open the floodgates" to an unlimited congressional power to federalize civil and criminal law. To date, counsel have identified only 51 cases with reported decisions in which plaintiffs asserted civil claims under VAWA, and of these 23 (or 45%) involve workplace (14/51), other commercial (2/51) or educational (7/51) settings.[18]

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[18] Cases involving workplace-related claims against employers or other employees include McCann v. Rosquist, 185 F.3d 1113 (10th Cir 1999); Henderson v. Heartland Press Inc., 1999 U.S. Dist. LEXIS 16466 (N. D. Iowa 1999); Grace v. Thomason Nissan, 1999 U.S. Dist. LEXIS 12711 (D. Ore. 1999); Whitaker v. Mercer County, 1999 U.S. Dist. LEXIS 14680 (D.N.J. 1999); Manikhi v. Mass. Transit Admin., 733 A.2d 372 (Md. Ct. Spec. App. 1999); Avila-Franco v. Worrell, 1998 U.S. Dist. LEXIS 12129 (D.D.C. 1998); Mattison v. Click Corp., 1998 WL 32597 (E.D. Pa. 1998); Randa Truong v. Smith, 28 F. Supp. 2d 626 (D. Colo. 1998); Braden v. Piggly Wiggly, 4 F. Supp. 2d 1357 (M.D. Ala. 1998);

Finley v. Higbee Co., 1998 U.S. Dist. LEXIS 21010 (N.D. Ohio 1998); Anisimov v. Lake, 982 F. Supp. 531 (N.D. Ill. 1997); Newton v. Coca-Cola Bottling Co., 958 F. Supp. 248 (W.D.N.C. 1997); Crisonino v. New York City Housing Auth., 985 F. Supp. 385 (S.D.N.Y. 1997); Bell v. Cuyahoga Community College, 1998 Ohio App. LEXIS 3741 (Ohio Ct. App. 1998). Other commercial settings include Wesley v. Don Stein Buick, Inc., 985 F. Supp. 1288 (D. Kan. 1997) (claim by customer against salesman); Palazzolo v. Ruggiano, 993 F. Supp. 45 (D.R.I. 1998) (claim by patient against psychiatrist). Cases involving educational settings include this case and Gross v. Weber, 186 F. 3d 1089 (8th Cir 1999) (claim by former student against former teacher); Doe v. Old Rochester Regional Sch. Dist., 56 F. Supp. 2d 114 (D. Mass. 1999) (claim by student against teacher); Liu v. Striouli, 36 F. Supp. 2d 452 (D.R.I. 1999) (claim by graduate student against professor/advisor); Ericson v. Syracuse Univ., 35 F. Supp. 2d 326, 45 F. Supp. 2d 344 (S.D.N.Y. 1999) (claim by student against coach); Thorpe v. Virginia State Univ., 6 F. Supp. 2d 507 (E.D. Va. 1998) (claim by student against student); B.F. v. Smith, 1998 Minn. App. LEXIS 300 (Minn. Ct. App. 1998) (same). Six cases involved claims against police, security or parole officers, *see e.g.*, Williams v. Bd. of County Commrs, 1999 U.S. Dist. LEXIS 13532 (D. Kan. 1999); Harris v. Zappan, 1999 U.S. Dist. LEXIS 8404 (E.D. Pa. 1999). One case involved claims against social acquaintances, *see* Doe v. Walker, 1999 U.S. App. LEXIS 24625 (1st Cir. 1999); one was by a parishioner against a minister, *see* Doe v. Hartz, 970 F. Supp. 1375 (N.D. Iowa 1997); one involved an alleged assault in a federal prison, *see* Thomasson v. United States, 1999 U.S. Dist LEXIS 13534 (D. Kan 1999); and one arose from an attack by a stranger, *see* Bridges v. City of Dallas, 1998 U.S. Dist LEXIS 8925 (N.D. Tex. 1998). Fourteen of the 51 cases involved claims against present or former spouses or boyfriends, *see, e.g.*, Kuhn v. Kuhn, 1999 U.S. Dist LEXIS 11010 (N.D. Ill. 1999) (spouse); Culberson v. Doan, 1999 WL 765970 (S.D. Ohio 1999) (boyfriend). (Four of the 51 cases did not have reported descriptions of the factual settings.)

Of course, assaults outside the workplace can also have a direct effect on the workplace, and the fact that violence occurs in family settings, as well as commercial, educational, prison, religious, and social settings, does not preclude federal jurisdiction. *Cf. Ankenbrandt v. Richards*, 504 U.S. 689, 704 (1992) ("domestic relations" exception to federal jurisdiction does not preclude tort action for assaults by father on children but applies only to divorce, child custody and alimony).

As the States' chief law enforcement officers recognized in urging Congress to enact VAWA,[19] the federal and the state governments have concurrent and complementary roles to play in this effort. Congress gave careful attention to federalism concerns in the lengthy drafting process, designing a civil cause of action that does not supplant any state remedies, and which limits the federal remedy to the most egregious instances of gender motivated violence. No state processes are reorganized by federal mandate. No state officials' time or tasks are commandeered. Establishing a federal remedy against perpetrators of gender-motivated violence is an appropriate means of removing barriers to the full and equal participation of women in the economic life of the nation.[20]

D. When Congress Deliberately Gathers Facts To Address A Problem Of National Import, The Court Must Be Careful Not To Intrude Lest It Violate The Separation of Powers.

Congress has the primary constitutional responsibility for developing appropriate responses to national economic problems. For most of our constitutional history, the Court

[19] *See Senate Hearings 1991*, *supra* note 7 at 37-38 (National Association of Attorneys General Resolution supporting enactment).

[20] The absence of a case-by-case inquiry into whether a particular act of gender motivated violence affects commerce cannot be fatal to the question of Congress' power here. For in *Katzenbach v. McClung*, a similar argument was made, that Congress should have provided for a case-by-case determination that "racial discrimination in a particular restaurant affects commerce." 379 U.S. at 303. The Court decisively rejected this contention. "Confronted as we are with the facts laid before Congress, we must conclude that it had a rational basis for finding that racial discrimination in restaurants had a direct and adverse effect on the free flow of interstate commerce. " *Id.* at 304.

has heeded the words of *McCulloch v. Maryland*, 17 U.S. 316, 423 (1819), that "where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government . . . to inquire into the degree of [the law's necessity] would be to pass the line which circumscribes the judicial department, and to tread on legislative ground."[21] When Congress began to respond to the economic challenges of late 19th and early 20th centuries, the Court repeatedly overturned legislation, asserting categorical limits on the commerce power.[22] Judicial attempts to constrain congressional development of economic policy came to a close in the late 1930s and 1940s, as the Court came to defer to Congress' superior capacity to define and respond to a wide range of problems with a significant impact on the national economy.

In the last decade, the Court has increased its scrutiny of the basis for congressional action. Unsupported assertions of a national interest, *see Lopez*, 514 U.S. at 567, pretextual justifications to support action actually aimed at a goal outside of national power, *see Boerne*, 521 U.S. at 532, or de minimis examples of a potential problem not yet of serious national import, *see Florida Prepaid Postsecondary Ed. Exp. Bd. v. College Savings Bank*, 119 S. Ct 2199, 2210

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[21] *See also id* at 421 (Constitution gives Congress discretion to carry out its powers "in the manner most beneficial to the people.").

[22] *See, e.g., Hammer v. Dagenhart*, 247 U.S. 251, 276 (1918) (invalidating federal law regulating movement of goods produced by child labor on ground that conditions of production were reserved to the states), overruled in *United States v. Darby*, 312 U.S. 100, 115-17 (1941); *Carter v. Carter Coal Co.*, 298 U.S. 238, 308-09 (1936) (invalidating Bituminous Coal Conservation Act on ground that only states could regulate terms of work in mines, notwithstanding the magnitude of coal strikes' effects on Nation's economy); for discussion, *see* BORIS I. BITTKER, BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE §5.02-.04 (1999).

(1999), will not suffice. Requirements of substantiation, however, should not be translated into requirements that congressional "findings" mimic the judicial process. Rules of evidence do not and should not apply, nor should court-based burdens of proof arguments. Indeed, as Justice Kennedy, concurring in *Lopez* counseled, judicial review should be predicated upon "great restraint." *Lopez*, 514 U.S. at 568. *See also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580 (1992)(Kennedy, J., concurring) (noting Congress' "power to define injuries and articulate chains of causation" for standing purposes).

A decision striking down VAWA would be wholly inconsistent with the Court's foundational jurisprudence on congressional power from 1937 forward. Were the Court to conclude that the evidence of direct and substantial effects on commerce was not sufficient in this case, a host of congressional statutes would be open to question. Indeed, challenges are already underway to a wide variety of federal statutes, including the Endangered Species Act, the Clean Water Act, CERCLA, the Child Support Recovery Act, and many others.[23]

What principles would guide this Court as it worked through the many statutes so challenged? How many witnesses, what kind of documentary material, and how long a hearing would suffice? The edifice of national power would be subject to repeated challenges as the Court reweighed the probative value of legislative investigations that form the predicate for congressional action.

But the Court should not and need not embark on

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[23] *See* Antony Barone Kolenc, *Commerce Clause Challenges After United States v Lopez*, 50 Fla. L. Rev. 867, 905-06, 914 (1998).

such an enterprise. The question under our Constitution is not what injuries to commerce the Court might find (nor, as to the Fourteenth Amendment, what remedies for constitutional discrimination the Court could give). The question is whether Congress had an adequate basis for acting under the Commerce Clause in creating the civil rights remedy in VAWA. As we have shown, the record before Congress was more than adequate to demonstrate that this is an arena in which Congress can lawfully act. To overturn this law, enacted with care and deliberation on this record, would indeed be to "pass the line which circumscribes the judicial department . . . to tread on legislative ground." *McCulloch v. Maryland*, 17 U.S. at 423.

II. THE VIOLENCE AGAINST WOMEN ACT IS AN APPROPRIATE EXERCISE OF CONGRESS' POWERS TO ENFORCE THE FOURTEENTH AMENDMENT.

A. Congress Found Pervasive and Entrenched Patterns of Sex Discrimination in State Criminal Justice Systems.

Congress enacted VAWA's civil rights remedy after years of hearings that documented widespread patterns of sex discrimination in state criminal justice systems. The evidence before Congress demonstrated that states deny women equal protection of the laws in the most fundamental sense: States fail to treat violent assaults against women as seriously as they treat other forms of violent assault. The pattern of sex discrimination Congress uncovered is pervasive, entrenched, and openly acknowledged by the state judiciaries themselves:

> "Study after study commissioned by the highest courts of the States . . . has concluded

> that crimes disproportionately affecting women are often treated less seriously than comparable crimes against men. Collectively these reports provide overwhelming evidence that gender bias permeates the court system and that women are most often its victims."

S. Rep. No. 102-197, at 43-44 (1991) (internal quotations omitted) (citing Gender Bias Task Force Reports from 17 states); *accord* S. Rep. No. 103-138, at 49 (1993).

For centuries States have regulated rape and domestic violence as assaults against women, and this explicit understanding of the gender of the victims not only shaped how state actors regulated such assaults in the past. As Congress recognized, gender-based discrimination continues in the administration of the criminal law today.

Historically, States regulated domestic violence in explicitly sex-based terms:

> "Until the 20th century, our society effectively condoned family violence, following a common-law rule known as the 'rule of thumb,' which barred a husband from 'restraining a wife of her liberty by chastisement with a stick thicker than a man's thumb.'"[24]

Long after States formally repudiated a husband's common-

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[24] S. Rep. No. 103-138, at 41 (1993); *see generally* Reva B. Siegel, *'The Rule of Love': Wife Beating as Prerogative and Privacy,* 105 Yale L.J. 2117, 2123-25 (1996) (discussing treatises and cases recognizing the husband's common-law prerogative to "chastise" or "correct" his wife).

law prerogatives, law enforcement officials often refused to intervene when husbands beat their wives. Until quite recently, this denial of equal protection was announced in openly sex-based terms.[25]

Like domestic violence, rape is a form of assault that States have traditionally defined and punished in explicitly sex-based terms. Following the common law, they also allowed husbands to rape their wives with impunity. While most States have now repealed or revised the marital rape exemption, the record before Congress showed that, even after these reforms, many States still refuse to protect women from husbands who rape or assault them.[26]

In short, until quite recently, States often defined and regulated rape and domestic violence in overtly sex-based

[25] *See* Siegel, *supra* note 24, at 2150-74. As late as 1975, the Oakland Police Department's *Training Bulletin on Techniques of Dispute Intervention* warned that "arrest will only aggravate the dispute or create a serious danger for the arresting officers . . . when a husband or father is arrested in his home." Del Martin, *Battered Wives* 93-94 (1976) (quoting Oakland Police Department's training bulletin). Congress could reasonably find that such discriminatory practices did not come to an end with the elimination of gender-specific language from police manuals. *See, e.g., 1992 House Subcomm. Hearing, supra* note 9, at 2 (statement of Rep. Charles Schumer) ("For hundreds of years, the legal system explicitly condoned violence against women. . . . . The rule of thumb now is that domestic violence cases are nothing but lovers' quarrels that are best left to be resolved without the police and the courts.").

[26] When the Congress first began to consider the problem of violence against women, it found that seven states did not define marital rape as a crime and 26 other states allowed prosecutions only under restricted circumstances. S. Rep. No. 102-197, at 45 n. 50 (1991)(citation omitted); this pattern persists today. *See* Jennifer Gaffney, *Amending the Violence Against Women Act: Creating a Rebuttable Presumption of Gender Animus in Rape Cases*, 6 J. L. & Pol'y 247, 259 n. 51 (1997) (discussing current status of marital rape exemption).

terms; some States still do.[27] Even if a State revises its rape law in gender-neutral language, legislators, police, prosecutors, judges, assailants and victims still understand rape as a form of assault by men against women. As witnesses emphasized, gender norms that have organized the criminal justice system for centuries cannot be eliminated by fiat or transformed overnight. As the Congress recognized, State responses to assaults traditionally directed at women have been deeply infected by various forms of stereotypical reasoning:

> "If these cases had involved the typical male assault victim, our reactions might be far different. Typically, we do not ask whether the victim of a barroom brawl is a real victim; we do not comment that the victim deserved to be hit; we do not inquire whether there was resistance or whether the victim said "no" persistently enough; we do not believe that the crime may have been fabricated altogether. Until the stereotypes upon which these scenarios are built seem as foreign for the victims of rape and domestic violence as they do for the victims of barroom brawls, our criminal justice system will pose barriers for

[27] With the rise of modern sex discrimination doctrine, states have generally rewritten their rape law in formally gender-neutral terms, yet many exceptions remain. *See, e.g.,* ALA. CODE § 13A-6-61(a), 13A-6-62 (a) (1999) (gender-specific definition of first- and second-degree rape); GA. CODE ANN. § 16-6-1(a) (1999) (gender-specific definitions of rape); IDAHO CODE § 18-6101 (1999) (gender-specific definition of rape); *see generally* MODEL PENAL CODE § 213. 1 (1) (1980) (originally adopted 1962; current through A.L.I. annual meeting, 1998 (WL 1999)) (defining rape as a crime committed by "[a] male who has sexual intercourse with a female not his wife").

> women it does not pose for others in our society."

S. Rep. No. 102-197 at 34 (1991).

Recent law reform efforts demonstrate just how difficult it is to alter the invidious gender-based attitudes and assumptions that have become institutionally entrenched under centuries of prior practice.[28] "The sad fact is that law reform has failed to eradicate the stereotypes that drive the system to treat these crimes against women differently from other crimes." S. Rep. No. 102-197, at 46 (1991). As the Senate Judiciary Committee concluded:

> "From the initial report to the police through prosecution, trial, and sentencing, crimes against women are often treated differently

[28] Numerous state gender bias task forces reported that invidious gender-based reasoning concerning violence against women lingers at every level of the State justice systems. *See, e.g., Report of the Illinois Task Force on Gender Bias in the Courts* 135 (1990) ("there continue to be problems in the following areas: . . . continuing police resistance in considering domestic violence a serious crime; . . . selective prosecution of domestic violence cases, accompanied by high rates of dismissal of these cases or reduction of the charges; . . . reluctance to impose prison sentences and the imposition of disproportionately low sentences in domestic violence cases. . . ."); *Utah Task Force on Gender and Justice* 60 (1990) ("Skeptical regard for the victim's credibility is a continuing problem in both [domestic violence and acquaintance rape] especially in interactions with law enforcement officers and prosecutors."); *Kentucky Task Force on Gender Fairness in the Courts* 28 (1992) ("Sex role stereotypes which blame the victim have played an important negative role in the lack of responsiveness in domestic abuse proceedings"); *Report to the Supreme Court of Georgia by the Commission on Gender Bias in the Judicial System* 103 (1991) ("Police are reluctant to charge and prosecute cases of acquaintance rape and police do not charge a husband with the rape of his wife").

> and less seriously than other crimes. Police may refuse to take reports; prosecutors may encourage defendants to plead to minor offenses; judges may rule against victims on evidentiary matters; and juries too often focus on the behavior of the survivors-laying blame on the victims instead of on the attackers." S. Rep. No. 103-138, at 42 (1993).

B. Failure to Provide Women Equal Protection from Assault is a Core Violation of the Equal Protection Clause.

After years of hearings, Congress concluded that "bias and discrimination in the [state] criminal justice system often deprive[] victims of crimes of violence motivated by gender of equal protection of the laws and the redress to which they are entitled." H. R. Conf. Rep. No. 103-711, at 385 (1994). The detailed testimony gathered, as well as the numerous state task force reports examined in the legislative process, did not simply uncover a long history of explicitly sex-based regulation. It established that, even today, state actors responsible for protecting citizens against assault repeatedly engage in decision-making riddled with invidious stereotypical judgments about women.

These congressional hearings established an ongoing, pervasive, and deeply entrenched pattern of official state action that violated the core guarantee of the Fourteenth Amendment: that state governments afford equal protection of the laws to all persons, regardless of their race or gender. Blacks as well as whites, women as well as men, are entitled to protection by police, prosecutors, and the criminal justice system. Failure to provide such protection on equal terms is

a denial of equal protection of the laws in its most basic sense. This concern clearly motivated the framers of the Fourteenth Amendment, who feared that state governments would fail to protect freed slaves from crimes of violence perpetrated by private actors.[29]

Affording women equal protection of the laws means treating crimes of violence perpetrated against women as seriously as crimes against men.[30] Where state officials fail to do so because of archaic stereotypes about women's proper role in society, they violate the clearest command of the Equal Protection Clause.[31] As this Court has often recognized, official discrimination against women may take the form, not of overt hatred, but of outmoded and archaic views about women's roles and their relationships to men. *See, e.g., United States v. Virginia*, 518 U.S. 515, 532-34 (1996); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 135-42 (1994); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724-25 (1982); *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (referring to Nation's "long and unfortunate history of sex discrimination. Traditionally, such

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[29] *See* JACOBUS TENBROEK, EQUAL UNDER LAW 157-208 (1965).

[30] The Equal Protection Clause guarantees persons equal protection of the laws in all spheres; state actions affecting persons in family relationships are no exception to this guarantee. *See Loving v. Virginia*, 388 U.S. 1 (1967); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Orr v. Orr*, 440 U.S. 268 (1979); *see also* Jill Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. Rev. 1297, 1335-53 (1998).

[31] This is not a case concerning a gender-neutral law or policy that incidentally impacts women, but a case concerning a long history of sex-based reasoning in criminal and civil law enforcement that leads state actors to treat violence against women less seriously than violence against men. There is abundant evidence of discriminatory purpose within the meaning of *Washington v. Davis*, 426 U.S. 229 (1976); *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977); and *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979).

discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage."); *see also Planned Parenthood v. Casey*, 505 U.S. 833, 893, 898 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.) (striking down spousal notice requirement because it could provoke domestic violence, and perpetuate constitutionally offensive common-law assumptions about a husband's dominion over his wife).

C. The Civil Rights Remedy is Well Within Congress' Broad Power to Remedy Violations of the Fourteenth Amendment.

1. The Civil Rights Remedy is Not a Pretext for Independent Congressional Interpretation of the Constitution.

Congress has broad powers to enforce the Fourteenth Amendment, and may legislate to prevent and remedy violations of its terms. *See, e.g., South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *Katzenbach v. Morgan*, 384 U.S. 641 (1966). But the power to enforce the amendment does not entitle Congress to revise the Court's interpretation of its commands. Because "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern," *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997), this Court evaluates legislation by asking whether there is "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 520. The test of proportionality is designed primarily to determine whether enforcement-clause legislation is actually crafted to remedy violations of constitutional rights. *Cf. College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119

S.Ct. 2219, 2225 (1999)(noting that remedy must be genuine attempt to enforce constitutional rights). If the use of remedial power is not pretexual, Congress must be given "wide latitude" to decide how best to remedy constitutional violations. *Boerne*, 521 U.S. at 520.

This case raises very different issues from those confronted in *Boerne*. In that case, the Court saw Congress' use of remedial power as a pretext for revising the judiciary's interpretation of the Constitution's meaning.[32] In this case, there is no evidence of a similar congressional effort at substantive reinterpretation. As a consequence, this Court should give Congress "wide latitude" in determining the most appropriate methods of remedying systemic and continuing violations of the Fourteenth Amendment.

2. Congress Sought to Work in Partnership with the States in Remedying Constitutional Violations While Respecting the States' Primary Role in Criminal Law Enforcement, and Narrowly Tailored the Civil Rights Remedy to Achieve These Ends.

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[32] In *Boerne*, there was abundant evidence that members of Congress disagreed with the Court's decision in *Employment Div. v Smith*, 494 U.S. 872 (1990), and sought to pass the Religious Freedom Restoration Act (RFRA) to 'overrule' this decision by statute. *See Boerne*, 521 U.S. at 515-16. Nevertheless, before this Court, defenders of RFRA argued that Congress was only attempting to enforce *Smith* through prophylactic legislation. The Court found this characterization of Congress' purpose in enacting RFRA unpersuasive. The Court saw a clear lack of proportion between the sparse contemporary history of intentional religious discrimination in the United States and the "[s]weeping coverage" of RFRA. *Id.* at 532. Hence this Court saw RFRA as neither a genuine attempt at remedying constitutional violations as defined in *Smith* nor an appropriate means for achieving that end. The proportionality test introduced in *Boerne* thus functioned to distinguish pretextual uses of remedial power from genuine ones.

In enacting VAWA, Congress sought to work with the States as partners in remedying and preventing violence against women. State task forces across the nation had discovered pervasive gender bias in state and local law enforcement, and state officials looked to Congress for help in solving a national problem.[33] Congress responded, through VAWA, by authorizing $1.6 billion in funds, mostly to States, local governments and Indian tribes to pay for (a) rape prevention and education programs, (b) victim services programs, (c) improved security in public transit, (d) the construction and maintenance of battered women's shelters, and (e) funding for additional law enforcement to assist with prosecution of cases of violence against women.[34] The civil rights remedy was yet another element in this federal-state partnership. It is not an isolated intervention but part of a total nationwide program to support and supplement state and local law enforcement while respecting the primary role of state governments in protecting citizens from violent assault.

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[33] *See Crimes of Violence Motivated by Gender, Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 103d Cong. 35 (Nov. 16, 1993) (letter from 41attorneys general) ("Our experience as Attorneys General strengthens our belief that the problem of violence against women is a national one, requiring federal attention, federal leadership, and federal funds."); *see also* S. Rep. 103-138 at 39 (describing hearing held during 102d Congress in which attorneys general of Illinois and Iowa "testified in support of a comprehensive Federal response to violence against women, particularly the need for a civil rights remedy"); *Senate Hearing 1991, supra* note 7 at 137 (Gill Freeman, Chair, Florida Supreme Court Gender Bias Study Implementation Commission) ("The message I received from one law enforcement officer was: Please tell Congress we are drowning; we need help.").

[34] *See* CONGRESSIONAL QUARTERLY ALMANAC, 103d Cong., 2d sess, v. L, at 274 (1994); *see also* JOSEPH R. BIDEN, SAFER STREETS, SAFER HOMES 20, 29-37 (Sept. 1999) ($1.4 billion so far appropriated for VAWA programs).

Congress' decision to create a civil remedy is consistent with Congress' larger purpose in enacting VAWA: to work in partnership with the States to eradicate historic forms of bias against women in the criminal justice system. The new remedy vindicates the dignitary and material interests of victims of gender-motivated violence, and promotes a legal order in which all members are recognized as equally worthy of protection from assault. Yet, like the larger statute of which it is a part, the civil rights remedy furthers these equal protection values in a federalism-friendly fashion.

Given Congress' interest in working with the States, it is not surprising that it chose a civil action rather than permitting injunctive or monetary relief against state officials for discriminatory underprosecution. Such alternatives would have required state and local officials to defend their actions against charges of sex discrimination in federal court. Given its broad remedial discretion, Congress surely has power to conclude that suits against state officials would not promote a federal-state partnership conducive to reform. Moreover, unlike the legislation at issue in the *College Savings* cases, Congress did not create a right of action against states for damages. Instead, the funding provisions of VAWA sought to enhance the fiscal capacity of the states to prosecute violence against women.

For these reasons, Congress had ample authority to create a civil cause of action against the perpetrators of gender motivated violence. The VAWA civil rights remedy does not commandeer state officials. It does not drain the coffers of state law enforcement agencies, and it does not displace state government functions. This solution allows the federal government to take an important leadership role

while leaving the states with primary responsibility for protecting citizens from physical assault.[35]

3. The Civil Rights Remedy in VAWA Is National Because It Deals With a National Problem.

Congress did not attempt to limit VAWA to particular States and local governments with histories of underenforcement for two reasons. First, the record makes clear that the problem of underenforcement was national. A nationwide solution, like the nationwide suspension of literacy tests in *Oregon v. Mitchell*, "may be reasonably thought appropriate when Congress acts against an evil such as racial discrimination which in varying degrees manifests itself in every part of the country." 400 U.S. 112, 284 (1970) (Stewart, J., concurring).

Second, Congress' desire to work with states rather than against them also explains its creation of a nationwide remedy. Had Congress attempted to single out individual states as especially culpable, it would have been more

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[35] Although the civil rights remedy as initially introduced would have applied to a broader range of violence against women, Congress took federalism values into account in deciding to limit the remedy to those cases of violence where plaintiffs could show that the violence was "due. . . to animus based on the victim's gender." 42 U.S.C. § 13981(d)(1). Congress' decision to focus the civil remedy on the most openly biased forms of violence against women, rather than the full range of violent assault against women, represents a federalism-sensitive judgment about the circumstances in which it was most important to make federal fora available, and presents none of the pretext or separation-of-powers concerns with which *Boerne* is concerned. *Boerne*'s proportionality test is surely not intended to call into constitutional question congressional acts of restraint motivated by federalism considerations. From this perspective, VAWA's civil remedy meets any reasonable understanding of proportionality and congruence.

difficult to gain cooperation for necessary reforms in the states that most needed them. By making the civil rights remedy applicable to all jurisdictions, and by distributing funds nationwide, Congress avoided identifying particular states as especially blameworthy, and made clear that it wanted to pursue reform by working with all states on an equal footing.

The VAWA remedy is thus a proportionate and congruent response to state violations of the Fourteenth Amendment, narrowly crafted to protect federalism interests, and well within Congress' enforcement powers as defined by this Court's recent cases.

CONCLUSION

For these reasons, the judgment below holding VAWA's civil remedy unconstitutional should be reversed.

Respectfully submitted

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Nos. 99-5, 99-29

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IN THE

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UNITED STATES,

Petitioner,

—v.—

ANTONIO MORRISON, *et al.*,

Respondents.

CHRISTY BRZONKALA,

Petitioner,

—v.—

ANTONIO MORRISON, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* FOR LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, AMERICAN JEWISH CONGRESS, AMERICAN JEWISH COMMITTEE, ANTI-DEFAMATION LEAGUE, HADASSAH, NATIONAL COUNCIL OF JEWISH WOMEN, JEWISH COUNCIL ON PUBLIC AFFAIRS, PEOPLE FOR THE AMERICAN WAY AND RUTGERS WOMEN'S RIGHTS LITIGATION CENTER, IN SUPPORT OF PETITIONERS

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

The American Jewish Committee, American Jewish Congress, Anti-Defamation League, Hadassah, Jewish Council on Public Affairs, Lawyer's Committee for Civil Rights, National Council of Jewish Women, Rutgers Women's Rights Litigation Center and People for the American Way move this Court for leave to file a brief *amici curiae* in support of Petitioners.

Counsel for Petitioners, and the United States, as well as counsel for Respondent Morrison, consented to these parties filing this brief. Counsel for Respondent James Crawford consented to the filing of this brief on behalf of all the amici except People for the American Way, which he described as "anti-Semitic, anti-Christian, anti-Constitution and anti anything that our founding Fathers and Mothers stood for." Counsel for the various parties have been unable to consent to the filing by Rutgers Women's Rights Litigation Center.

The agencies seeking to file this brief all have long histories of supporting a vigorous federal role in the protection of the civil rights of all Americans. This brief, which focuses on congressional power under § 5 of the Fourteenth Amendment, reflects these commitments, and the familiarity of *amici* with the pertinent legal issues.

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INTEREST OF AMICI*

The Lawyers' Committee for Civil Rights Under Law ("Lawyer's Committee"), established in 1963 at the request of President Kennedy to help assure civil rights to all Americans, is a non-profit private corporation that has enlisted the services of thousands of members of the private bar in cases involving voting, education (including school desegregation), employment, housing, municipal services, the administration of justice and law enforcement.

The American Jewish Congress is an organization of American Jews founded in 1918 to protect the civil, economic, political and religious rights of American Jews and all Americans. It believes that Congress has broad authority to protect the fundamental liberty of all Americans to be free of bias-motivated assaults.**

Summary of Argument

This brief is submitted on behalf of several organizations in support of the civil rights remedy of the Violence Against Women Act of 1994 (VAWA), 42 U.S.C. § 13981(c), which provides the victims of violent crimes motivated by gender with a right of recovery against their attackers. This brief demonstrates that Congress properly enacted the VAWA civil rights remedy as an exercise of its power under Section 5 of the Fourteenth Amendment to remedy State violations of the Equal Protection Clause.***

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* This brief was authored in its entirety by the *amici curiae* and its counsel, and no person or entity other than the *amici curiae* or its counsel made a monetary contribution with respect to its preparation or submission.

** The interest of additional *amici* is set forth in Appendix A hereto.

*** The signatories to this brief also endorse the position, set forth in Petitioner's brief, that the Act is a valid exercise of Congress' power under the Commerce Clause.

The court below erred in concluding that the VAWA civil rights provision was directed purely against private conduct — rather than State constitutional violations — and thus fell outside Congress' Fourteenth Amendment power. The Fourth Circuit ignored Congressional findings that the States purposefully discriminate against women victims of gender-motivated violence in the operation of their criminal justice systems. This error fatally infected the lower court's decision.

The VAWA civil rights remedy did not create or expand any substantive constitutional right. Rather, it represents remedial action by Congress based on findings that the States discriminate against women in the operation of their criminal justice systems, thereby violating the Equal Protection Clause.

Where, as here, Congress has properly found a State violation of a substantive protection of the Fourteenth Amendment, this Court has long recognized that the legislature has broadly sweeping authority to enact remedial measures congruent with and proportional to that violation. This Court in *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), emphasized that — in order to remedy or prevent constitutional violations — Congress can choose to prohibit or penalize conduct that is not itself violative of the Constitution.

Here Congress did not remotely test the boundaries of its Section 5 enforcement power by addressing State practices — such as voter literacy tests — that are *not* themselves prohibited by the Fourteenth Amendment. Rather, Congress sought to provide a remedy addressing governmental action that is *unquestionably* a Fourteenth Amendment violation: purposeful discrimination against women by the States.

The Fourth Circuit's failure to understand and account for the congressional findings underlying the VAWA civil rights remedy led the lower court to misapply the "state action" holding of the *Civil Rights Cases*, 109 U.S. 3 (1883). The *Civil Rights Cases* held that Congress lacked the power to

reach private conduct in the absence of a state constitutional violation. Here, by contrast, Congress found that the States *have* violated the rights of women by engaging in purposeful discrimination against them in the operation of their criminal justice systems. In this context, the "state action" argument at the heart of the lower court's decision is simply irrelevant.

The only issues properly before this Court are whether: (1) Congress had a reasonable basis for finding purposeful discrimination by the states; and (2) Congress' chosen remedy, *i.e.*, permitting a private cause of action by victims of gender-motivated violence against their attackers, constitutes a reasonable exercise of Congress' enforcement power. Both of these issues should be resolved in Congress' favor.

First, Congress' findings of discriminatory conduct here are as strong as those at issue in cases such as *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966); *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966); and *City of Rome* v. *United States*, 446 U.S. 156 (1980). In those cases, this Court affirmed Congress' conclusion that States had unconstitutionally discriminated against African Americans seeking to exercise their right to vote, permitting a broad range of highly intrusive federal regulations of local electoral processes. Here, Congress made similar, and amply supported, findings that the States purposely discriminate against women who are victims of gender based violence in the operation of their criminal justice systems, thereby justifying remedial action.

Second, the means Congress chose to remedy the State constitutional violation — *i.e.*, permitting an action against those who commit violent, gender-based offenses against women — is clearly within its Section 5 powers. No constitutional provision nor any decision of this Court excludes private parties from the scope of Congress' remedial powers. To the contrary, this Court ruled in *United States* v. *Guest*, 383 U.S. 745 (1966), that Congress *may* reach the conduct of private persons to remedy a Fourteenth Amendment violation. The Court

below misread *Guest* to stand for the proposition that Congress' remedial powers may extend to private persons *only* when such persons are themselves responsible for the violation. The salient question before this Court, however, is not whether the defendants were personally responsible for the State of Virginia's constitutional violation, but rather whether Congress has the remedial power to reach felons in order to remedy the State's equal protection violation. The answer to this question is yes.

This Court has consistently held that Congress may employ any means appropriate — *i.e.*, congruent and proportional and not otherwise prohibited by the Constitution — to remedy a Fourteenth Amendment violation. There is no barrier to Congress' choice of remedy here, *i.e.*, supplementing the States' constitutionally defective criminal justice systems with a private cause of action against those who commit gender-motivated crimes.

Far from over-stepping its constitutional bounds in enacting the VAWA civil rights remedy, Congress chose a means of addressing the States' equal protection failings that was far less intrusive than other remedial options available to it. Congress did *not* broadly convert crimes against women into federal crimes nor coercively withhold federal funds from States that failed to enact federally prescribed statutes.

After finding that the States discriminate in the enforcement of their laws respecting gender-motivated violence, Congress enacted an entirely congruent and proportional remedy: permitting the victims of such crimes to recover from their assailants. This Court should uphold Congress' proper exercise of its Fourteenth Amendment enforcement power.

POINT I

CONGRESS FOUND A PERVASIVE EQUAL PROTECTION VIOLATION

After an extensive legislative fact-finding process, Congress found "overwhelming evidence that gender bias permeates [state] court system[s]," S. Rep. No. 102-197 (1991) at 43-44, and that this "existing bias and discrimination in the criminal justice system often deprives victims of crimes of violence motivated by gender of equal protection of the laws and the redress to which they are entitled." H. Conf. Rep. No. 103-711 (1994) at 385. Enacted against a backdrop of compelling historical and continuing evidence of gender discrimination by the states, the VAWA civil rights remedy, 42 U.S.C. § 13981(c),* is tailored to address a crucial element of this violation: state laws and state law enforcement officials that have systematically under-deterred and under-prosecuted gender-motivated violent felons.

Evidence of pervasive gender discrimination by States against victims of domestic violence and rape led to passage of the VAWA civil rights remedy. *See infra* Section A. While "judicial deference" is owed to any Congressional finding that a right clearly protected under the Fourteenth Amendment has been violated, *see Boerne*, 521 U.S. at 531-32, the record of state discrimination here is detailed and extensive and compares favorably with every other case in which this Court has reviewed laws exercising Congress' Section 5 power. *See infra* Section B.

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* The VAWA civil rights remedy creates a private damages cause of action for a victim of a violent crime who can demonstrate that the crime constituted a felony and that it was motivated by gender.

A. Congress Found that State Criminal Justice Systems Discriminate Against Women in Affording Protection from Violent Injury and Sexual Abuse.

Congress found that "victims of gender-motivated violence have a right to equal protection of the laws, including a system of justice that is unaffected by bias or discrimination and that, at every relevant stage, treats such crimes as seriously as others" and that "a Federal civil rights action as specified in this section is necessary to guarantee equal protection of the laws." S. Rep. No. 103-138, at 29 (1993). The evidence compiled in the detailed inquiries of three Congresses amply supports these findings.

1. History of pervasive legal subjugation and bias

For much of American history, women were explicitly denied by the laws of every state such essential civil rights as suffrage, property ownership, and freedom from domestic violence. State common law explicitly permitted men to batter, whip and rape their wives. In the 1870s, most states formally rejected the "right of chastisement" — the legal right of a husband to beat his wife — yet courts in practice continued to deny protection to women who suffered violent domestic abuse. *See, e.g., State* v. *Rhodes*, 61 N.C. (Phil. Law) 453, 454 (1868) (declining to affirm based on a right of chastisement, yet upholding decision that husband was not guilty of battery for whipping his wife because "the evil of publicity would be greater than the evil involved in the trifles complained of"); Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 Yale L.J. 2117, 2129-2164 (1996) (describing formal repudiation of right of chastisement in 1870s and subsequent denial of protection to battered wives) ("Siegel").

Explicit discrimination was maintained in both criminal and private law: "Regardless of whether a husband beat, choked, stabbed, or shot his wife, all courts reviewing [intentional

tort] claims initially rejected them, reasoning that spouses could-not sue each other in tort." Siegel at 2163. As Congress explicitly noted:

- The common law "rule of thumb," intended to provide some measure of protection to women from brutal bludgeonings, barred a husband from "restraining a wife of her liberty by chastisement with a stick thicker than a man's thumb." S. Rep. No. 103-138, at 41.
- "It was not until a century ago that the laws began to change to revoke a man's legal right to beat his wife. . . . Despite the positive changes in the law of the last century, *the criminal justice system continues to ignore or condone battering.*" *Examining the Rise of Violence Against Women in the State of Maine and Other Rural Areas*, Hearing Before the Senate Committee on the Judiciary, 103d Cong., 1st Sess., at 2 (Sen. Cohen) (emphasis added).
- "Over 300 years ago, English jurist Matthew Hale cautioned that rape is a charge 'easily to be made and hard to be proved, and harder to be defended by the party accused, tho' ever so innocent.' This officially expressed skepticism . . . took the form of special rules requiring victims to produce corroborating witnesses, to show 'prompt complaint,' or to demonstrate 'utmost resistance' to the attack. In the late 1970s, many states began to abolish those rules. Unfortunately, the spirit of Sir Hale's words lives on in laws, practices and stereotypes." S. Rep. No. 102-197, at 45 (citations omitted).

2. Continuing de jure discrimination by the States

Congress recognized that vestiges of this history of explicit, unequal treatment under law persist in the substantive laws of a large number of states, most egregiously in laws limiting protection to victims of spousal rape. *See* S. Rep. No. 102-197, at 45 n.50. Congress found that discriminatory laws

presently exist in various forms: "a few states still fail to recognize rape of a spouse as a criminal act; other states do not prosecute husbands for rape unless a wife suffers 'additional degrees of violence like kidnapping or being threatened with a weapon;' others classify rape of a spouse as a less serious crime with lesser penalties." S. Rep. No. 103-138, at 42 (quoting Diana Russell, *Rape in Marriage* 21-23 (1990)). For example:

- *Lesser penalties for marital rape*: in Arizona, forcible spousal rape may be a misdemeanor, while non-forcible, non-spousal rape is a serious felony, Ariz. Rev. Stat. Ann. 13-1406.01; in Virginia, a spousal rapist's penalty may be limited to mandatory counseling, whereas a stranger rapist faces a minimum penalty of five years incarceration, Va. Code 18.2-67.2:1B; 18.2-61C; in West Virginia, the maximum penalty facing a spousal rapist is less than or equal to the minimum penalty facing a stranger rapist, W. Va. Code § 61-8B-3;

- *Spousal immunities:* in South Carolina, spousal immunities can render a husband not liable for rape unless committed with "aggravated force," S.C. Code Ann. 16-3-658, 16-3-615; in Maryland, spouses are immune from prosecution for certain first and second degree rapes (*e.g.*, a spouse may not be prosecuted for first degree rape based on a threat of violence), Md. Ann. Art. 27 sec. 464D(c); in Mississippi and Louisiana, a spouse is not liable for non-forcible rape, Miss. Code Ann. 97-3-99, La. R.S. 4:43(A); in Wyoming, a spouse is immune from certain sexual assault offenses including rape of a victim with mental illness, Wy. Stat. Ann. 6-2-302 (iv).

- *Interspousal tort immunity*: many states prevent or limit recovery by battered women seeking to recover intentional tort damages, Leonard Karp & Cheryl L. Karp, *Domestic Torts: Family Violence, Conflict and Sexual Abuse* § 1.16 (1995). The doctrine of interspousal tort immunity "survived well into the twentieth century, and today still bars

claims of intentional torts, either in whole or in part, in nearly a fifth of the states." Siegel at 2163.

- *Discriminatory complaint requirements*: so-called "prompt complaint" requirements in some states bar rape prosecutions against spouses where a complaint is not brought within 30 days, S.C. Code Ann. 16-3-615; Ill. Comp. Stat. Ann. 5/12-18(c), or within a year, Cal. Penal Code § 262. *See also* S. Rep. No. 102-197, at 45 (noting that courts tend to place great emphasis on the speed with which rape charges are brought, thereby "reviving in practice the 'prompt complaint rule' ").

- *Discriminatory trial standards*: many jurisdictions adhere to the common law "fresh complaint rule" in rape trials, which creates a rebuttable presumption against the credibility of rape complaints not filed soon after the alleged assault. Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. Davis. L. Rev. 1013, 1041-43 (1991). Moreover, in an echo of Sir Hale's dictum, pattern jury instructions used in some state courts diminish victim credibility by pointedly reminding juries of the possibility of false accusations of rape. *Id.* at 1046. *See* S. Rep. No. 102-197, at 44.

3. Discriminatory enforcement of state law

While states have gradually removed most *de jure* discrimination against women victims, pervasively discriminatory enforcement practices exist at *every* level of state criminal justice systems.

Police. Congress found that police officers display a widespread reluctance to "interfere" in matters of domestic violence and that this discriminatory refusal to enforce the law, in turn, feeds a reluctance on the part of victims even to report violations.

- "A 1989 study in Washington, DC, found that in over 85% of the family violence cases where a woman was found bleeding from wounds, police did not arrest her abuser." S. Rep. No. 103-138, at 41.
- Victims related their experience of law enforcement indifference and intransigence to Congress: "Not only was I greatly abused that day by my husband, but I was also abused by the system. Not one person has said what happened to me was an assault or that I could press charges or that I could have a protective order, not one person." *Examining the Rise of Violence Against Women in the State of Maine and Other Rural Areas*, Hearing Before the Senate Committee on the Judiciary, 103d Cong., 1st Sess., at 15 (Nov. 2, 1993) (statement of Lisa).
- "In cases where a comparable assault by a stranger on the street would lead to a lengthy jail term, a similar assault by a spouse will result neither in arrest nor in prosecution." S. Rep. No. 103-138, at 41.
- Roughly one out of four rape victims surveyed who chose not to report the rape did so because "they thought the police would be inefficient, ineffective, or insensitive." *Crimes of Violence Motivated by Gender*, Hearing Before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 103d Cong., 1st Sess., at 118 (Nov. 16, 1993) (statement of Fund for the Feminist Majority).

Prosecutors. Congress found that violent crimes against women are systematically under-prosecuted compared to other violent crimes and that prosecutors tend to bring charges carrying lower penalties in cases of acquaintance rape or domestic violence.

- Prosecutors routinely do not file acquaintance-rape cases, reasoning that convictions are unlikely "because the victim and the perpetrator know each other." S. Rep. No. 102-197, at 47.

- "[V]ictims of rape are often unable to find either justice or protection in the criminal justice system. From the initial report to the police through prosecution, trial, and sentencing, crimes against women are often treated differently and less seriously than other crimes. Police may refuse to take reports; prosecutors may encourage defendants to plead to minor offenses; judges may rule against victims on evidentiary matters." S. Rep. No. 103-138, at 42.
- "Judges, juries, prosecutors and police officers question the credibility of rape victims based on a number of circumstantial matters that are irrelevant in determining whether a criminal act occurred. For example, they may require a woman . . . to take a lie detector test, to not have waited more than 48 hours before reporting the incident, to not have engaged in premarital or extramarital sex, to have had no previous social contact with her assailant, and not to have reached the location of the rape voluntarily." *Id.* at 45-46.

Courts. Congress found that widespread gender bias among judges contributes to the judicial system's failure to afford women equal protection of the laws.

- Numerous state task forces "identified widespread gender bias in the courts, particularly in cases of rape and domestic violence." *Id.* at 44; *see also id.* at 49 n.52 (citing state gender bias task force reports); S. Rep. No. 102-197, at 43 n.40 (same).
- "Studies from a number of States report 'pervasive suspicion of rape victims' credibility,' infecting the criminal justice system at every step of the way. Judges and juries expect more corroboration in sexual assault cases than in other cases of a similar class even where there is no such legal requirement." S. Rep. No. 103-138, at 45.
- "[M]any judges and court personnel ask battered women what they did to provoke the violence. Several state task

forces have cited judges who disbelieve female petitioners unless there is visible evidence of severe physical injury, trivialize domestic violence complaints by their demeaning and sexist comments ('Let's kiss and make up and get out of my court'), and tell the victim seeking relief in criminal court that this is a domestic problem that belongs in family court." *Women and Violence*, Hearing Before the Senate Committee on the Judiciary, 101st Cong., 2d Sess., at 65 (June 20, 1990) (statement of NOW Legal Defense and Education Fund).

- "The New York Task Force found that in some communities judges shunt victims back and forth between police and family court until they give up seeking protection." *Id.*

4. Statistics reflecting the effect of bias and unequal protection

Finally, Congress properly assessed the harm flowing from widespread discrimination by amassing telling empirical and statistical evidence. To wit:

- "[R]ape reporting and prosecution rates have not changed substantially with law reform." S. Rep. No. 102-197, at 45 n.47.
- "[O]ver 60 percent of rape reports do not result in arrests." S. Rep. No. 103-138, at 42.
- "Studies indicate that, despite decades of legal reform, there has been no significant increase in . . . rape arrest rates." *Id.* at 45.
- A rape survivor has a 5% chance of seeing her attacker convicted. S. Rep. No. 102-197, at 44.
- A rape case is "nearly 40 percent more likely to be dismissed than a robbery case." S. Rep. No. 103-138, at 42.

- "Three out of four women will be the victim of a victim of violent crime sometime during their life." S. Rep. No. 103-138, at 38.
- One-third of all incidents of domestic violence would be classified as felony rape, robbery or aggravated assault. S. Rep. No. 102-197, at 38.
- The remaining two-thirds involve bodily injury at least as serious as the injury inflicted in 90% of all robberies and aggravated assaults. *Id.*
- One-third of all women murdered in 1990 were killed by either their present or former husbands or boyfriends. *Id.*
- "Almost one quarter of convicted rapists never go to prison." S. Rep. No. 103-138, at 38.

* * *

Harmful and foundationless gender discrimination, like that found by Congress here, violates the Equal Protection Clause. *See, e.g., United States* v. *Virginia*, 518 U.S. 515, 532 (1996) ("[This] Court has repeatedly recognized that neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature.").

B. Congress' Findings of a Fourteenth Amendment Violation Clearly Satisfy this Court's Deferential Standard of Review.

Congress has broad authority both to *find* Fourteenth Amendment violations and to fashion suitable remedies. *City of Boerne* v. *Flores*, 521 U.S. 507, 525-28 (1997). And, where Congress does not seek to expand the scope of substantive constitutional rights, but rather acts to remedy a core equal protection violation, its findings are subject to broad judicial deference. *Boerne*, 521 U.S. at 531 (such deference "is based *not* on the state of the legislative record, but 'on due regard

for the decision of the body *constitutionally appointed to decide*.' ") (quoting *Oregon* v. *Mitchell*, 400 U.S. 112, 207 (1970)) (emphasis added). Thus, deference to Congress' findings flows from separation of powers principles. *Id.* at 535 ("When Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution.").

In light of Congress' role as the body "constitutionally appointed" to enforce the rights guaranteed under the Fourteenth Amendment, courts do not second-guess legislative findings of a core constitutional violation, but ask only whether Congress had a "factual basis" for acting. *Boerne*, 512 U.S. at 526-27 (citing *Katzenbach* v. *Morgan*, 384 U.S. 641, 656); *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 490 (1989) (Congress' section 5 enforcement power "include[s] the power to define situations which *Congress* determines threaten principles of equality and to enact prophylactic rules [under Section 5] to deal with those situations."); *see also Metro Broadcasting, Inc.* v. *FCC*, 497 U.S. 547, 605 (1990) (O'Connor, J., dissenting) ("Congress has considerable latitude . . . when it exercises its unique [Section 5] remedial powers").

Where, as here, Congress acts against an incontrovertible historical backdrop of "widespread and persisting" discrimination, courts must defer to its conclusion that purposeful discrimination would persist absent Congressional action. *See Boerne*, 521 U.S. at 526-27, 532-33.

Far from granting appropriate deference to Congress' finding of widespread discrimination against women in state criminal justice systems, the court below substituted its own independent judgment for that of Congress. *See* Opinion Below, 169 F.3d 820, 883-87 (4th Cir. 1999). The Fourth Circuit's demanding scrutiny of Congress' findings is directly contrary to this Court's teaching.

Application of the "factual basis" standard establishes that Congress acted well within its constitutional authority in rendering its findings here. Indeed, the record supporting the VAWA civil rights remedy is strikingly analogous to that which supported the provisions of the Voting Rights Act of 1965 reviewed in *South Carolina* v. *Katzenbach*, 383 U.S. 301, 308-15 (1966). There Congress found: (a) a long history of violent, *de jure* discrimination against African Americans under unequal laws; (b) the replacement of explicit legal discrimination with discriminatory enforcement of seemingly equal laws; (c) a "widespread pattern" of discrimination by biased state actors at every level of government; and (d) statistical evidence suggesting that despite legal reform efforts, inequality persisted in fact. *Id.* at 312-315.

So too here, Congress explicitly found that a period of explicit legal denial of women's rights has been followed by a period of systematic under-protection of the rights of women due to a widespread pattern of biased and discriminatory state enforcement. Furthermore, statistical and empirical findings also indicated that legal reform efforts have so far failed to result in real improvement in the treatment of women in the States' criminal justice systems. *See, e.g.*, S. Rep. No. 103-138, at 45.

Although the plenary findings accompanying VAWA match those reviewed in *South Carolina*, subsequent precedents establish that such extensive findings as made here are not required of Congress. The voting rights cases after *South Carolina* upheld legislative findings on a deferential, rational review standard that certainly did not require — as the Court below would — detailed, particularized showings of purposeful state discrimination. *Boerne*, 521 U.S. at 526-27.*

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* In *Morgan*, Congress offered no specific findings of invidious discrimination against Puerto Rican voters subject to voter literacy tests, yet this Court deferred to Congress' judgment regarding the existence of such discriminatory animus. *See* 384 U.S. at 656 ("It is enough that we perceive a basis upon which Congress might predicate a judgment that the

Apart from ignoring the facts found by Congress, the lower court majority likewise all but ignored the facts alleged by the plaintiff in this case. *Compare Brzonkala*, 169 F.3d at 906-08 (Motz, J., dissenting). The Fourth Circuit's silence as to Ms. Brzonkala's allegations is notable, as her allegations echo Congress' findings as to the discriminatory governmental treatment of victims of gender-based crimes.

Plaintiff alleges she was forcibly raped by two men in a dormitory of her state university. When she reported these crimes to university officials they did not report the rapes to the police (sexual assault is the *only* violent felony that the university authorities do not automatically report to the police). After two, onerous, duplicative hearings, the university found one of the rapists guilty of abusive conduct and sentenced him to a two semester suspension. This he appealed successfully: the university set aside the sanction, finding that, although the evidence showed a violation of the university's abusive conduct policy, a one year suspension was "excessive." Thus, the rapist returned to school and rejoined its football team in the next term, while Ms. Brzonkala withdrew, fearing for her physical safety. The facts alleged underscore Congress' conclusion that the States deliberately underenforce criminal laws prohibiting rape and other gender-based felonies — thus requiring a federal remedial response.

* * *

application of New York's English literacy requirement . . . constituted an invidious discrimination in violation of the Equal Protection Clause.").

The record here is clearly distinguishable from that which this Court found lacking in its review of the Religious Freedom Restoration Act (RFRA). *Boerne, supra*. There the Court concluded that Congress had not adduced evidence that the States had intentionally burdened Free Exercise rights, as this Court held was required. Here, by contrast, there is ample evidence of explicit and invidious, ongoing bias in the operation of state criminal justice systems. *Compare also Oregon* v. *Mitchell*, 400 U.S. 112 (1970) (invalidating federal statute prohibiting state 21-year-old vote requirements where Congress had not found that such requirements were a mechanism for prohibited discrimination).

Where Congress does *not* expand the substantive reach of the Fourteenth Amendment, but rather acts within its constitutionally appointed role in finding a violation of an established equal protection right, deference is owed to its findings. Here, Congress responded to intentional state discrimination against women: it found that states treat violent crimes against women — notably rape and domestic abuse — "less seriously than comparable crimes affecting men." S. Rep. No. 103-138, at 49. Congress also sought to remedy invidious discrimination caused by a historically rooted gender bias that it found to "permeate[ ]" states' criminal justice systems and to "often deprive[ ] victims of gender-motivated crimes of equal protection of the laws." S. Rep. No. 102-197 at 44; S. Rep. No. 103-138, at 29. This Court should not repudiate Congress' carefully considered and amply supported findings of pervasive state discrimination against the victims of gender-motivated violence.

POINT II

THE VAWA CIVIL RIGHTS REMEDY IS A PROPER EXERCISE OF CONGRESS' REMEDIAL POWER

Where, as here, Congress has properly found the States to have violated the Equal Protection Clause of the Fourteenth Amendment, Section 5 grants the legislature "broad[ly] sweep[ing]' " powers to "make . . . effective" Section 1's substantive protections. *City of Boerne* v. *Flores*, 521 U.S. 507 (1997). As this Court recently reiterated:

> Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not pro-

hibited, is brought within the domain of congressional power.

— *Boerne*, 521 U.S. at 517, (quoting *Ex parte Virginia*, 100 U.S. 339, 345-46 (1879)).

As explained in *South Carolina* v. *Katzenbach*, 383 U.S. 301, 326 (1966), the deferential "appropriateness" test for judicial review of Congress' exercise of its 14th Amendment enforcement power is essentially the same rational basis standard applied "in all cases concerning the [exercise of the] express powers of Congress with relation to the reserved powers of the States." *Id.* (citing *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819)).

Thus, like any other exercise of an enumerated power granted to the Congress, a legislative act passed pursuant to Section 5 is presumed valid. And — absent the existence of some affirmative limitation upon Congress authority (*e.g.*, derived from some other portion of the Constitution) — any remedy that is reasonably and appropriately calculated to remedy or prevent a violation of the Fourteenth Amendment should be upheld. *Morgan*, 384 U.S. at 651 (Section 5 is a "positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.").

In fashioning an "appropriate" remedy, Congress is not limited to prohibiting or penalizing conduct that actually violates the substantive guarantees of the Amendment. Rather, "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional". *Boerne*, 521 U.S. at 518. Congress may impose broad remedies — *e.g.*, proscribing conduct that is *not* violative of the Constitution — even if it thereby works significant "intru[sions] into [the] 'legislative spheres of

autonomy previously reserved to the States' ". *Id.* (quoting *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 455 (1976)).

This Court has upheld numerous congressional enactments that restricted, or even proscribed, otherwise constitutional state practices and activities upon a congressional finding that such practices could cause or amplify the effects of constitutional violations by the States. *See, e.g., City of Rome* v. *United States*, 446 U.S. 156 (1980) (upholding seven year extension upon Voting Rights Act's requirement for preclearance by certain jurisdictions of *any* change to a "standard, practice, or procedure with respect to voting" in order to enforce Fifteenth Amendment protections); *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966) (upholding ban on literacy tests applied to persons from Puerto Rico based on congressional finding that such tests posed risk of contributing to Fourteenth and Fifteenth Amendment violations); *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966) (upholding numerous Voting Rights Act provisions under Congress' authority to impose prophylactic remedies to prevent constitutional violations).

While Congress' Fourteenth Amendment enforcement authority is broad and sweeping, it is not boundless. As explained (Point I, *supra*), the Fourteenth Amendment reserves to the courts the authority to discern the substantive scope of the rights guaranteed by the Amendment. And Congress may not employ its enforcement power to increase or modify the scope of those constitutional rights. *Boerne*, 521 U.S. at 519. Even here, however, the design of the Fourteenth Amendment mandates substantial judicial deference to the legislative judgment of Congress. As this Court recently explained, "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have *wide latitude* in determining where it lies." *Id.* at 519-20 (emphasis added).

In light of the deference due Congress in its "constitutionally appointed", *id.* at 531, role as the primary enforcer of the Equal Protection and Due Process guarantees, a reviewing court must sustain a Section 5 remedy so long as there is a showing of "congruence and proportionality between the injury to be prevented or remedied" — *i.e.*, the threatened or actual State violation — "and the [legislative] means adopted to that end." *Boerne*, 521 U.S. at 519; *accord College Savings Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S.Ct. 2219, 2224 (1999). *Only* if such a remedial "connection" is wholly lacking should a court conclude that a statute is defectively "substantive in operation and effect." *Boerne*, 512 U.S. at 519. The VAWA civil rights remedy was carefully tailored to satisfy this standard.

A. The VAWA Civil Rights Remedy is Both Congruent With and Proportional to the Constitutional Violation Found by Congress

The VAWA civil rights remedy easily satisfies the congruence and proportionality standard set forth in *Boerne*.

First, the *congruence* between the Equal Protection violation — *i.e.*, the States' purposeful and ongoing discrimination against female victims of gender-based violence in their criminal justice systems — and the legislative remedy — *i.e.*, permitting a civil damages recovery against the felons who commit such violence — is manifest. Indeed, the linkage could hardly be more direct. The VAWA civil rights remedy provides the persons most directly affected by the State violation a right that appropriately compensates them for dire injuries they suffer.

It is of no constitutional moment that the felons who commit such criminal acts are — while responsible for their own criminal behavior — not personally responsible for the States' equal protection violations. For Congress has ample discretion under Section 5 to allow suits against those who commit acts of gender based violence as a supplement to state

criminal enforcement that Congress found constitutionally defective.

Despite the close linkage between the congressional finding of a violation and the legislature's prescription of a civil rights remedy, the Fourth Circuit opined that the applicable congruence standard was unsatisfied. The lower court's conclusion derived from a fundamental error that we have already addressed, *i.e.*, the Fourth Circuit's conclusion that Congress had *not* actually found a Fourteenth Amendment violation by the States. Had the court below properly credited Congress' findings with respect to the States' ongoing and systematic violation of the rights of women victims of gender-based violence, a finding of congruence would necessarily have followed.

Second, Congress deliberately fashioned the VAWA civil rights remedy to be *proportional* to the scope and parameters of the States' equal protection violation. Thus, the statute's reach is limited solely to cases involving the most serious of violent acts directed against women, *i.e.*, criminal conduct that constitutes a felony under applicable federal or state law. *See* 42 U.S.C. § 13981(d)(2) (defining "crime of violence" to include a state or federal "felony against the person" or state or federal felony that "presents a serious risk of physical injury to another").

Furthermore, a VAWA civil rights plaintiff must prove that the crime she has suffered was motivated by gender animus, thus ensuring that the remedy's reach is restricted to that set of crimes — such as rape — that Congress found the States to systematically under-prosecute and invidiously under-enforce. *See* 42 U.S.C. § 13981(d)(1) (defining "crime of violence motivated by gender" to include "crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender").

The Fourth Circuit took Congress to task for not limiting the scope of its civil rights remedy even *further*, *e.g.*, by

employing the sort of geographical and/or temporal restrictions included in certain provisions of the Voting Rights Act. 169 F.3d at 887. The Fourth Circuit's critique of Congress' enforcement scheme is, however, of no constitutional moment. For while Congress might have chosen even further to delimit the scope of the VAWA civil rights remedy, it was not required to do so. As this Court recently explained, there is simply no general requirement that Section 5 legislation contain "termination dates, geographic restrictions or egregious predicates." *Boerne*, 521 U.S. at 533.

Such limitations on the exercise of Congress' remedial powers will be necessary if ever only where a "congressional enactment pervasively prohibits constitutional state action in an effort to remedy or prevent unconstitutional state action". *Id*. The Voting Rights Act and the RFRA statute (which the *Boerne* Court noted intruded upon the administration of local zoning rules and imposed substantial litigation burdens on states and localities, 521 U.S. at 534) are the sorts of statutes that are so intrusive upon the administrative and regulatory authority of the States as potentially to require such tailoring.

The VAWA civil rights remedy is certainly *not* such a regulation, as the provision imposes virtually no burdens or intrusions upon state or local government. Indeed, as we discuss in further detail below (*see infra* Point III), the VAWA civil rights remedy was designed specifically and deliberately to *avoid* such interference. The statute imposes no intrusion or burden upon the States' law enforcement activities. Likewise, the VAWA civil rights remedy was specifically designed to prevent intrusions upon the States' role in adjudicating divorce and other domestic relations disputes by preventing the removal of such actions to federal court in connection with a VAWA civil action. *See* 42 U.S.C. § 13981(e)(4).

B. Congress Has the Power to Reach the Criminal Conduct of Private Persons to Remedy States' Constitutionally Violative Administration of Their Law Enforcement Responsibilities

As this Court reiterated in *Boerne*, Congress has "sweeping" authority to employ any "appropriate" means to remedy a state violation of the Fourteenth Amendment. *See* 521 U.S. 517. Nonetheless, the Fourth Circuit concluded that this broad congressional enforcement authority is dramatically limited where private persons are concerned. Thus, the lower court stated that Congress is generally lacking in Section 5 authority to "regulate private conduct," 169 F.3d at 869, even where (as here) Congress has found that such criminal conduct is inextricably connected to the States' ongoing violation of the equal protection rights of women.

In fact, far from holding that the criminal conduct of private persons is outside the scope of Congress' expansive remedial power, this Court has held to the precise contrary. In *United States* v. *Guest*, this Court upheld an indictment seeking to impose a criminal penalty upon private persons in order to remedy a violation of the Fourteenth Amendment. 383 U.S. 745 (1966). The Court in *Guest* apparently considered the proposition that Congress is empowered by Section 5 to impose criminal — let alone a civil — remedies upon private persons so uncontroversial that the matter was not even discussed in the opinion.

The focus of *Guest*'s analysis was upon a different question: whether — and under what circumstances — a private person might himself actually *commit* a Fourteenth Amendment violation. This additional question arose in *Guest* because the government's criminal charges were premised on an allegation that the defendant private persons had — acting in concert with certain state authorities — worked the Section 1 violation that formed the constitutional gravamen of the charges. *Guest* upheld the government's indictment, reasoning that the charges alleged sufficient state involvement in the

underlying equal protection violation to satisfy the state action requirement of the Fourteenth Amendment. The Opinion of the Court in *Guest* noted, however, that it was leaving to be answered on another day the question of whether the Fourteenth Amendment permits Congress or the Courts to reach instances in which the government was less intimately involved in a putative constitutional violation. *See id.* at 756.

Contrary to suggestions in the Fourth Circuit's decision, this case does not require the Court to revisit the question it left deliberately open in *Guest*, because, unlike in that case, the constitutional violations that form the Section 5 basis for the VAWA civil rights remedy are not committed by private persons. Rather, the violations that Congress found to pervade the investigation and enforcement of criminal laws with respect to gender motivated violence are *entirely* attributable to state actors, *i.e.*, the police, prosecutors and judges that (discriminatorily) administer their States' criminal justice systems.

Thus, in contrast to *Guest*, Congress did *not* find that the criminals who are made liable in damages under the VAWA civil rights remedy *commit* Fourteenth Amendment violations in the name of the State. It *did* find, however, that it was appropriate to impose damages liability upon private felons in order to *remedy* the effects of the States' constitutional failings, one of which is to foster more criminal violence against women than would otherwise occur. And the *Guest* decision made it clear — had it ever been ambiguous or uncertain before — that private persons who engage in criminal acts are not immune from the broad reach of Congress' Fourteenth Amendment enforcement powers, where holding them civilly liable is appropriate to remedy the consequences of state discrimination.

C. The VAWA Civil Rights Remedy Fully Satisfies the Fourteenth Amendment's State Action Requirement.

The VAWA civil rights remedy is premised on a congressional finding that the States are responsible for an ongoing

violation of the Fourteenth Amendment equal protection rights of women victims of gender motivated violence. Despite this finding, the Fourth Circuit concluded that two precedents in which this Court first explored the nature and scope of the Fourteenth Amendment's state action requirement — *United States* v. *Harris*, 106 U.S. 629 (1883) and the *Civil Rights Cases*, 109 U.S. 3 (1883) — are somehow fatal to the constitutionality of the VAWA civil rights remedy. In fact, those portions of the holdings in *Harris* and the *Civil Rights Cases* that remain good law are entirely consistent with Congress' exercise of its enforcement power to enact the VAWA civil rights remedy.

In *Harris*, this Court held unconstitutional Section 2 of the Civil Rights Act of 1871, which forbade private conspiracies to deny persons equal protection of the laws, absent any underlying finding — like that made in enacting VAWA — that the States had failed in their constitutional responsibilities to protect African Americans or other minorities against such private criminal conduct. *See, e.g.*, 106 U.S. at 640 (noting that Section 2 "is directed *exclusively* against the action of private persons, without reference to the laws of the States, or their administration by the officers") (emphasis added). And, in the *Civil Rights Cases*, this Court nullified the public accommodations provisions of the 1875 Civil Rights Act, which created equal rights of access to privately owned inns, public conveyances and places of amusement, absent a finding that the States were implicated in the denial of such access.

In both cases, the Court reasoned that Congress' exercise of its Fourteenth Amendment enforcement powers must be directed at providing "modes of redress" for the "action of state officers, executive or judicial, when these are subversive of the fundamental rights specified in the amendment." *Civil Rights Cases*, 109 U.S. at 11; *accord Harris*, 106 U.S. at 639 ("[w]hen the state . . . has not . . . denied to any person within its jurisdiction the equal protection of the laws . . .

the [Fourteenth] amendment imposes no duty and confers no power upon congress").

Because the statutes at issue were "not predicated" upon "*any* supposed or apprehended violation of the fourteenth amendment on the part of the states", [they] did not withstand constitutional scrutiny the *Civil Rights Cases*, 109 U.S. at 14 (emphasis added); *Harris*, 106 U.S. at 635 (same); *see also Guest*, 383 U.S. at 782 (Brennan, J., concurring and dissenting in part) (noting that, per the *Civil Rights Cases*, Congress' Section 5 power is confined to the adoption of "appropriate legislation for correcting the effects of prohibited state law and state acts").

The VAWA civil rights remedy lacks the defects found in the legislation reviewed by the Court in *Harris* and the *Civil Rights Cases*. The provision in issue is firmly grounded upon a congressional finding of State constitutional violation, and was properly calculated by the legislature to serve as a means of remedying the consequences of that violation. As this Court stated in the *Civil Rights Cases*, remedial legislation enacted under Section 5 must "be directed to the correction of the[ ] operation and effect" of unconstitutional action by the States (109 U.S. at 11); and — in permitting victims of gender based violence who have not properly been protected by the States to exact a remedy from their attackers — Congress has acted with just such a constitutionally appropriate remedial purpose.

The lower court also relied heavily upon language in Harris and the *Civil Rights Cases* it read to indicate that the Fourteenth Amendment requires "an individualized showing that the State had unconstitutionally deprived the particular victim of a right protected by the Fourteenth Amendment" in order for the Congress to vindicate the victim's rights through the exercise of the Section 5 enforcement power. 169 F.3d at 866 (citing *Harris*, 106 U.S. at 639-40 and the *Civil Rights Cases*, 109 U.S. at 14). From this reading of the two Reconstruction-era precedents, the Fourth Circuit derived a corollary proposition that Congress "may regulate private conduct [under Section 5] pursuant [only] to a statute that applies [upon] an individualized showing of a State's violation of the Fourteenth Amendment." 169 F.3d at 869.

If such an individualized showing were in fact required, it would be amply satisfied on the facts alleged here. The plaintiff alleges that the administrators of the state college she attended left both defendants unpunished for a brutal gang rape. In any event, no such showing is required, for Congress need only find that the remedy is appropriate (*i.e.*, congruent and proportional) to a properly found State violation. That standard is eminently satisfied here.

The fact that the objects of the congressionally prescribed remedy are comprised of private persons, *i.e.*, the violent criminals that the States have failed to protect women against, is simply of no constitutional moment. This Court has never recognized a hidden limitation upon Congress' remedial power, reflected nowhere in the language of the Fourteenth Amendment, granting violent felons an immunity from the broad remedial reach of Section 5.*

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* Furthermore, this Court's governing precedents do not suggest that a "particularized showing" requirement — which the Fourth Circuit discerns in the *Civil Rights Cases* — has somehow survived solely with respect to congressional enforcement regulations reaching private conduct. To the contrary, as explained, the *Guest* decision — which the *Boerne* Court explicitly noted may have modified or superseded the holdings in *Harris* and the *Civil Rights Cases*, 521 U.S. at 525 — the Court assumed (without even seeing the need for analysis) that Congress had full authority to reach private conduct in remedying a constitutional violation.

POINT III

THE VIOLENCE AGAINST WOMEN ACT REFLECTS CONGRESS' DUE RESPECT FOR THE ROLE OF THE STATES IN OUR FEDERAL SYSTEM

The Fourteenth Amendment grants Congress broad authority to "intrude[ ] into legislative spheres of autonomy previously reserved to the States." *Boerne*, 521 U.S. at 517 (quotation omitted). In responding to the pervasive state constitutional violations against the victims of gender-based crimes, Congress demonstrated a salutary deference to the role that the Constitution reserves for the States in our federal system.

Congress chose not to displace, or engage in wholesale duplication of, state and local law enforcement responsibilities. Thus, while VAWA did include some supplementation of and enhancements to federal criminal laws, these new provisions were limited to reaching acts of domestic violence involving an interference with interstate travel. 18 U.S.C. §§ 2261-62.*

Nor did Congress force the States to make changes — or otherwise intercede — in their enforcement efforts. For example, Congress might have authorized the Justice Department and/or private persons to bring injunctive actions against the states to cure their violations. Congress also might have broadly conditioned the States' receipt of federal law-enforcement related funding on the achievement of prescribed changes in their law enforcement efforts with respect to crimes of violence against women.** Congress, however,

* The VAWA also increased penalties for federal rape convictions (18 U.S.C. §§ 2261-62), and altered the Federal Rules of Evidence to alleviate discrimination against women in the federal justice system.

** The statute contains the minimal requirement that states pay for rape exams in order to be entitled to funds to develop and strengthen law enforcement and prosecution strategies to combat crime against women. 42 U.S.C. § 3796gg-4.

rejected any such coercive remedies, and instead sought to provide the States with assistance in reforming their own law enforcement efforts.

Thus, VAWA provided a variety of grants and other assistance to aid the States. *See, e.g.*, 42 U.S.C. § 10401-02; 42 U.S.C. § 300w-10 (granting funds to support educational efforts aimed at reducing violent crimes against women); 42 U.S.C. § 3796gg (granting funds to develop and strengthen effective law enforcement and prosecution strategies to combat violent crimes against women). Furthermore, Congress granted the states funds to improve training in the area of domestic violence for judges, law enforcement and other governmental personnel with important responsibilities in these areas. 42 U.S.C § 13991-4002. Finally, Congress sought to grant further enforcement authority to the States in the area of domestic violence, this by enacting a provision requiring each state to grant full faith and credit to a protective order issued by the courts of another state. 18 U.S.C. § 2265.

Congress recognized, however, that reforming criminal justice systems so pervasively infected by equal protection violations will take time. Thus — in addition to assisting the States in their reform efforts — legislators reasonably concluded that there was a need to provide a remedy directly in favor of those who are most directly injured by the ongoing constitutional violations, *i.e.*, the victims of gender based violence. The VAWA civil rights remedy fills that need. Even here, however, Congress was careful not to intrude unduly upon State prerogatives. Significantly, the VAWA civil rights remedy is substantively grounded upon the States' — as well as federal — criminal laws, which are incorporated by reference into the statute's definition of "crime of violence". *See* 42 U.S.C. § 13981(d)(2). Further, the statute does not render illegal any conduct that was not already proscribed by federal or state law, and reserves a role for the State courts, providing a plaintiff with the option to choose to bring a VAWA civil action in a state court.

It is therefore unsurprising that a number of state law enforcement officials, including numerous state attorneys general, endorsed the VAWA civil rights remedy, recognizing that it was complementary of state law enforcement efforts. *See, e.g., Violence Against Women: Victims of the System*, Hearing before Senate Judiciary Committee, 102d Cong., 1st Sess., at 24-84 (April 9, 1991) (Attorneys General of Iowa and Illinois); *Crimes of Violence Motivated by Gender*, Hearing Before Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 103d Congress, 1st Sess., at 31 (Nov. 15, 1993) (statement of National Association of Women Judges) (civil rights remedy would be "complementary" of state enforcement efforts; noting that provision avoided undue intrusion into "traditional state court functions").

Conclusion

The VAWA civil rights remedy — like the entirety of the Violence Against Women Act — reflects a measured attempt by Congress to address equal protection violations by the States in dispensing criminal justice, while respecting the States' autonomy and authority to administer their laws. This Court should sustain the statute as a proper exercise of the enforcement power granted Congress under Section 5 of the Fourteenth Amendment, and the decisions below should be reversed.

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Appendix A

The American Jewish Committee ("AJC"), a national organization of approximately 100,000 members and supporters, was founded in 1906 to protect the civil and religious rights of Jews. It is the conviction of the AJC that these rights will be secure only when the civil and religious rights of all Americans are equally secure. AJC participates as *amicus* here in support in Congress's use of its Fourteenth Amendment enforcement power to remedy constitutional deprivations caused by the States.

The Anti-Defamation League ("ADL"), one of the nation's oldest civil rights organizations, was founded in 1913 to promote good will among all races, ethnic groups, and religions. As set out in its charter, ADL's "ultimate purpose is to secure justice and fair treatment to all citizens alike and to put an end forever to unjust and unfair discrimination against and ridicule of any sect or body of citizens." To this end, ADL is committed to eradicating discrimination and violence against women and ensuring their full civil rights. ADL is convinced that the Violence Against Women Act is a constitutionally sound and appropriate response to a serious societal problem, and has previously filed *amicus* briefs in this case before the United States Court of Appeals for the Fourth Circuit and in other cases involving this statute.

Hadassah is the largest women's and the largest Jewish membership organization in the United States, with over 300,000 members nationwide. Founded in 1912, Hadassah is traditionally known for funding and maintaining health care institutions in Israel. However, Hadassah also has a proud history of protecting the rights of Jewish women and the Jewish community in the United States, whether by supporting equal rights, freedom of choice, access to health care, or working to eliminate all forms of violence against women. Hadassah has been a strong advocate for the Violence Against Women Act, which is crucial in helping to combat gender-based violence.

The National Council of Jewish Women, Inc. (NCJW), is a volunteer organization inspired by Jewish values, that works, through a program of research, education, advocacy and community service, to improve the quality of life for women, children and families and strives to ensure individual rights and freedoms for all. Founded in 1893, the NCJW has 90,000 members in over 500 communities nationwide. Given NCJW's early and active involvement in the passage of the Violence Against Women Act and NCJW's *National Resolutions*, which support "the elimination of, and protection from, all forms of harassment, violence and abuse against women everywhere," we join this brief.

People For the American Way Foundation ("People For") is a nonpartisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism and liberty, People For now has over 300,000 members nationwide. People For has been actively involved in efforts to combat discrimination and to ensure equal protection of the laws to all Americans through adoption and enforcement of strong civil rights laws, including civil rights laws enacted pursuant to Congress' powers under Section 5 of the Fourteenth Amendment. People For has joined in filing this *amicus* brief in order to vindicate the fundamental constitutional and civil rights principles at stake — namely, that Congress retains the power to secure the guarantees of equal protection of the laws to all Americans through appropriate legislation, including the legislation at issue in this case.

The Jewish Council for Public Affairs (JCPA), formerly the National Jewish Community Relations Advisory Council, is an umbrella organization of 13 national and 122 local Jewish public affairs and community relations agencies across the United States. Founded in 1944, the JCPA is committed to the dual mission of safeguarding the rights of Jews here and abroad and also promoting a just society for all Americans. To

that end, the JCPA has made the promotion of civil rights a major priority on its agenda. Among other accomplishments, the agency played a leading role in the founding of the Leadership Conference on Civil Rights, one of the most powerful voices in the continuing struggle to secure equality for all Americans. The JCPA has strongly supported passage of the Violence Against Women Act, as well as many other laws founded on Congressional authority under both the Commerce Clause and Section 5 of the 14th Amendment.

The Rutgers Women's Rights Litigation Center is dedicated to the equal protection of women under law and strongly supports the Violence Against Women Act and Congress' enactment thereof pursuant to its Fourteenth Amendment enforcement power.

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Nos. 99-5 and 99-29

In The

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

vs.

ANTONIO MORRISON, et al.,

Respondents.

CHRISTY BRZONKALA,

Petitioner,

vs.

ANTONIO MORRISON, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF EQUAL RIGHTS ADVOCATES; AMERICAN ASSOCIATION OF UNIVERSITY WOMEN; AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO; BREAK THE CYCLE; BUSINESS AND PROFESSIONAL WOMEN/USA; THE JUNIOR LEAGUE OF BIRMINGHAM, INC. [AND ADDITIONAL *AMICI* LISTED ON INSIDE FRONT COVER] IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Amici hereby respectfully move for leave to file the attached brief *amici curiae* in this case. The consents of the Solicitor General, counsel of record for petitioner the United States, counsel of record for petitioner Christy Brzonkala, and counsel of record for respondent Antonio Morrison have been obtained. The consent of Joseph Graham Painter, Jr., attorney for respondent James L. Crawford, was requested but refused.

The interest of *amici* in this case arises from the fact that they are women's, civil rights, business, labor, medical and legal services organizations that recognize the deep economic impact of violence against women and are strongly committed to eliminating gender-based violence, a goal the 1994 Violence Against Women Act ("VAWA") – and, in particular, the statute's civil rights remedy for victims of gender-motivated violence – is designed to help achieve.

The brief *amici* propose to file supplements the arguments raised by the petitioners. Specifically, the brief lends additional support to petitioners' position that Congress acted within its Commerce Clause authority in enacting the VAWA civil rights remedy. The brief explains that additional social science data, beyond that already explicitly considered by Congress in enacting the VAWA and made available after the VAWA's enactment, further documents the severe limitations gender-based violence places on women's contribution to the national economy,

as well as the direct and immediate medical and social costs caused by such violence. As we show, these studies demonstrate that gender-motivated violence (1) hinders women's participation in, and contributions to, the national economy by decreasing women's ability to secure and maintain employment and to advance and be productive in their jobs, (2) increases women's need for and use of medical services, and (3) causes lower-income families to make greater demands on public assistance programs such as welfare.

In light of the foregoing, *amici* believe that the attached brief will assist the Court in its deliberations in this case and, therefore, respectfully urge the Court to permit the brief to be filed.

Respectfully Submitted,

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INTEREST OF *AMICI CURIAE*

Amici curiae are a broad array of women's, civil rights, business, labor, medical and legal services organizations, all of which recognize the deep economic impact of violence against women and are strongly committed to eliminating gender-based violence. Each has an abiding interest in ensuring the continued viability of the civil rights remedy provided by the 1994 Violence Against Women Act ("VAWA"), 42 U.S.C. § 13981, which recognizes a federal civil right to be free of gender-motivated violence and creates a civil remedy for violations of that right. Descriptions of the individual organizations are set forth in the attached Appendix.[1]

SUMMARY OF ARGUMENT

Congress enacted the VAWA in 1994 to address "the escalating problem of violence against women." S. Rep. No. 103-138, at 37 (1993). In Congress' view, the VAWA civil rights remedy, which gives victims of gender-motivated violence a federal cause of action against their attackers, was one of the "[m]ost important[ ]" components of this legislation. S. Rep. No. 103-138, at 38. The VAWA civil rights remedy is "truly a [classic] civil rights remedy. It redresses conduct that is motivated by bias or hatred toward a class of individuals because of a defining characteristic – gender." *Crimes of Violence Motivated By*

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[1] This brief was authored by the *amici* and counsel listed on the front cover, and was not authored in whole or in part by counsel for a party. No one other than the *amici* or their counsel made any monetary contributions to the preparation or submission of this brief.

Gender: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 103d Cong. 101-02 (1993) (statement of James P. Turner, Acting Assistant Attorney General, Civil Rights Division, U.S. Department of Justice). The statute reflects "a national commitment to condemn crimes motivated by gender in just the same way that [Congress has] . . . condemn[ed] crimes motivated by race or religion." S. Rep. No. 101-545, at 41 (1990).

Congress concluded that a primary reason for making a national commitment to remedying gender-based violence was the enormous adverse effect such violence had on interstate commerce. During four years of extensive investigation and consideration of the problem of gender-motivated violence, Congress heard voluminous testimony about the substantial threat to interstate commerce posed by gender-motivated violence and about the way that such violence limits women's equal participation in the national economy. Based on this evidence, Congress found that "crimes of violence motivated by gender have a substantial adverse effect on interstate commerce, by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products." H. R. Conf. Rep. No. 103-711, at 385 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1839, 1853; *see also* S. Rep. No. 103-138, at 54 (1993) ("Gender-based crimes and the fear of gender-based crimes restrict[ ] movement, reduce[ ] employment opportunities, increase[ ] health expenditures, and reduce[ ] consumer spending, all of which affect interstate commerce and the national economy").

This case requires the Court to decide, inter alia, whether the Constitution's Commerce Clause (U.S.

Const., art. I, § 8, cl. 3) gave Congress the power to remedy what it perceived to be a significant harm to interstate commerce from gender-motivated violence. "[I]n the first and primary instance," "the political branches . . . [have] the sworn obligation to preserve and protect the Constitution in maintaining the federal balance. . . . " *United States v. Lopez*, 514 U.S. 549, 577 (1995) (Kennedy, J. and O'Connor, J., concurring). Congress took this obligation very seriously in enacting the VAWA. Petitioners' briefs and the *amicus curiae* brief of Senator Joseph R. Biden, Jr. (the statute's chief sponsor) describe the extensive legislative history of Congress' enactment of the VAWA civil rights remedy and demonstrate that Congress affirmatively and rationally concluded that the impact of gender-motivated violence on interstate commerce is substantial.

This brief does not repeat those discussions. Rather, we further demonstrate the rationality of Congress' conclusion regarding the substantial impact of gender-motivated violence on interstate commerce. We do this by presenting additional social science data documenting the severe limitations gender-based violence places on women's contributions to the national economy, as well as the direct and immediate medical and social costs caused by such violence. These well-documented studies demonstrate (1) that gender-motivated violence hinders women's participation in, and contributions to, the national economy by decreasing women's ability to secure and maintain employment and to advance and be productive in their jobs, (2) women's increased need for and use of medical services as a result of gender-based

violence, and (3) the link between gender-motivated violence and lower-income families' greater demands on public assistance programs such as welfare.

STATEMENT OF THE CASE

In September 1994, Christy Brzonkala, a freshman at Virginia Polytechnic Institute ("Virginia Tech"), was gang-raped in her dormitory by fellow students Antonio Morrison and James Crawford, both of whom were members of the school's football team. *See Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 169 F.3d 820, 827 (4th Cir. 1999) (en banc). After raping Brzonkala, Morrison warned her, " '[y]ou better not have any f[uck]ing diseases.' " *Id.* In the months following the rape, Morrison announced publicly in the dormitory's dining hall that he " 'like[d] to get girls drunk and f[uck] the s[hit] out of them.' " *Id.* Brzonkala learned another male student had advised Crawford that he should have " 'killed the bitch' " after raping her. *Id.* at 907 (Motz, J., dissenting).

As a result of the rape, Brzonkala stopped attending classes and eventually dropped out of college. *See id.* (Motz, J., dissenting). She became depressed and withdrawn, attempted suicide, and sought psychiatric treatment from a Virginia Tech psychiatrist, who prescribed antidepressant medication. *See id.* (Motz, J., dissenting). Although Brzonkala planned to return to school, she canceled those plans when she learned Virginia Tech, after investigating the rapes, had decided to let Morrison return to campus under a " 'deferred suspension.' " *Id.* at 908 (Motz, J., dissenting).

In December 1995, Brzonkala filed suit against Morrison and Crawford, invoking the VAWA civil rights remedy, 42 U.S.C. § 13981. *See id.* (Motz, J., dissenting). The

district court dismissed the claim and a panel of the United States Court of Appeals for the Fourth Circuit reversed. *Id.* (Motz, J., dissenting); *Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 132 F.3d 949 (4th Cir. 1997). Following rehearing en banc, the Court of Appeals affirmed the district court's order, holding Congress exceeded its authority in enacting the statute. *See Brzonkala*, 169 F.3d at 826.

ARGUMENT

SOCIAL SCIENCE DATA MADE AVAILABLE AFTER THE ENACTMENT OF THE VAWA CIVIL RIGHTS REMEDY CONFIRMS CONGRESS' CONCLUSION THAT GENDER-MOTIVATED VIOLENCE SUBSTANTIALLY AFFECTS INTERSTATE COMMERCE.

A. Overview: Gender-Based Violence Harms The National Economy.

In concluding that the enactment of the VAWA civil rights remedy fell within Congress' Commerce Clause powers, the Senate Judiciary Committee found that "violent crime against women costs this country at least 3 billion . . . dollars a year" (S. Rep. No. 101-545, at 33 (1990)) and that "health care, criminal justice, and other social costs of domestic violence" total $5 billion to $10 billion a year (S. Rep. No. 103-138, at 41 (1993)). Social science data published since the VAWA's enactment establishes that the costs of gender-motivated violence to the national economy are even more substantial than Congress believed. In 1996, for example, the National Institute of Justice ("NIJ") concluded that domestic

violence against adults – 90% to 95% of them women[2] – accounts for almost 15% of total crime costs, or $8.8 billion per year in medical and employment costs and $58 billion per year in additional losses such as emotional harm. *See* Ted R. Miller et al., National Inst. of Justice, *Victim Costs and Consequences: A New Look* 1, 18-19 (1996) [hereinafter *Victim Costs*].[3] The NIJ found that victim costs attributable to rape (a crime committed against women at a rate 14 times greater than men[4]) amounted to $7.5 billion in economic harm annually and $119 billion per year in emotional costs to victims. *See Victim Costs, supra,* at 1, 17, 23.

Additional post-enactment data more particularly documents the ways in which gender-motivated violence adversely impacts women's participation in the national economy, and increases women's utilization of medical services and reliance on public assistance.

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[2] *See* Ariella Hyman et al., *Laws Mandating Reporting of Domestic Violence: Do They Promote Patient Well-Being?*, 273 JAMA 1781 (1995) [hereinafter *Reporting of Domestic Violence*]; Laurence A. Greenfeld, U.S. Dept. of Justice, *Violence by Intimates: Analysis of Data on Crimes by Current or Former Spouses, Boyfriends, and Girlfriends* v (1998) [hereinafter *Violence by Intimates*]; Bureau of Justice Statistics, U.S. Dept. of Justice, *Violence Between Intimates* 2 (1994).

[3] The National Institute of Justice, a component of the Office of Justice Programs, is the research and development agency of the United States Department of Justice. *See Victim Costs, supra,* at unnumbered page following title page.

[4] *See* Callie M. Rennison, U.S. Dept. of Justice, *Criminal Victimization 1998: Changes 1997-1998 with Trends 1993-98* 5 (1999).

B. Gender-Motivated Violence Severely Limits Women's Employment Opportunities And Productivity.

1. Recent studies reinforce Congress' findings that gender-motivated violence prevents women's full participation in the national economy.

Congress found that "[g]ender-based violence bars its most likely targets – women – from full partic[ipation] in the national economy" (S. Rep. No. 103-138, at 54 (1993)) and heard testimony that domestic violence alone costs the nation's employers $3 to $5 billion annually through absenteeism (*Women and Violence, Hearings Before the Senate Comm. on the Judiciary,* 101st Cong., 58 (1990) [hereinafter S. Hrg. 101-939], pt. 1 (statement of Helen Neuborne, executive director of NOW Legal Defense and Education Fund)). Congress concluded that gender-motivated violence physically prevents American women from fully participating in commercial activity and that domestic violence "in particular significantly impairs [women's] job performance . . . [because] [v]ictims of domestic violence are often harassed by their batterers at work, prevented from arriving to work on time, and kept from attending work altogether because of serious injuries." Johanna R. Shargel, Note, *In Defense of the Civil Rights Remedy of the Violence Against Women Act,* 106 Yale L.J. 1849, 1854 (1997); *see also* S. Hrg. 101-939, pt. 1, at 69 (1990) (statement of NOW Legal Defense and Education Fund); *id.* at 58, 68-69; S. Rep. No. 103-138, at 54 & n.70 (1993); S. Rep. No. 101-545, at 33 (1990).

Congress also determined that the threat of violence adversely impacts commerce by affecting women's employment decisions and conduct: "[T]he fear of gender-based violence affects the economy because it

deters women from taking jobs in certain areas or at certain hours that pose a significant risk of such violence."[5] S. Rep. No. 103-138, at 54 (1993); *accord* S. Rep. No. 102-197, at 53 (1991). Fear of violence also deters women disproportionately from using public transportation. *See* S. Hrg. 101-939, pt. 1, at 69 (statement of NOW Legal Defense and Education Fund) (footnote omitted). "The likelihood of crime on certain modes of public transportation also acts as a barrier to mobility, particularly for those women who have no alternative to public transportation because of economic constraints." *Id.*; *see also id.* (as a result of the limitations fear of violence imposes on the use of public transportation, employment opportunities for women dependent on public transportation are reduced). As the Senate Judiciary Committee observed, gender-motivated violence also causes long-term economic harm in the form of "lost careers, decreased productivity, foregone educational opportunities, and long-term health problems." S. Rep. No. 101-545, at 33 (1990).

Numerous studies completed subsequent to the enactment of the VAWA further document the extent to which gender-motivated violence reduces women's employment opportunities, job advancement, and productivity, thereby excluding them from full participation in the national economy. As the American Psychological Association noted earlier this year: "Violence interferes with work, job training, and education and thus undermines women's attempts at economic independence. In

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[5] This Court has similarly concluded that rape "undermines the community's sense of security" and thereby inflicts "public injury" as well as private harm. *See Coker v. Georgia*, 433 U.S. 584, 598 (1977).

addition, pervasive violence may also leave women with physical injuries and psychological consequences that make work difficult." American Psychological Ass'n, *Making "Welfare to Work" Really Work: Domestic Violence* (visited Oct. 18, 1999) <http://www.apa.org/pi/wpo/domestic.html> [hereinafter *American Psychological Ass'n Report*]. A 1998 report of the General Accounting Office ("GAO") similarly concluded that gender-based violence prevents women from maintaining employment and adversely impacts their job performance:

> [R]esearch . . . indicates that the effects of domestic violence on a woman's job performance can make it difficult for some battered women to maintain their employment or to advance in their jobs. According to the surveys of service providers and abused women we reviewed, women may be late for work or miss work entirely for reasons such as . . . unexpected lack of child care and visible injuries. In addition, abusers' harassment of women at work could jeopardize their jobs. . . .
>
> Some domestic violence victims may, in addition, experience emotional or physical health problems that could potentially affect their ability to find and maintain employment. The studies we reviewed found that the women who had been abused often suffered from chronic health problems, low self-esteem, and depression and exhibited behaviors associated with post-traumatic stress disorder (PTSD).

U.S. General Accounting Office, *Domestic Violence: Prevalence and Implications for Employment Among Welfare Recipients* 8-9 (1998) [hereinafter *GAO Report*].

2. Batterers use violence to actively prevent women from entering the workforce and gaining economic independence.

Exclusion from the workplace is often the intended result, not merely an unintended consequence, of violence against women. Studies indicate that "abusers often feel threatened by a woman's efforts to improve [herself] and become financially independent, since those efforts could provide options to women that would help them leave the abusive relationship." *GAO Report, supra*, at 7; *see also Reporting of Domestic Violence, supra*, at 1783 ("Batterers often escalate the violence if their partners increase help-seeking measures or attempt separation"). As a result, "[h]igh percentages of abused women report[ ] . . . interference from their intimate partners with education, training and work." Jody Raphael & Richard M. Tolman, Project for Research on Welfare, Work, and Domestic Violence, *Trapped in Poverty/Trapped by Abuse: New Evidence Documenting the Relationship Between Domestic Violence and Welfare* 5 (1997) [hereinafter *Trapped in Poverty/Trapped by Abuse*]; *see also id.* at 9 ("Some women on welfare who do not comply with work and/or training requirements while receiving assistance are being prevented from doing so by the direct behavior of an abusive partner, or by the indirect effects of the abuse on their health and well-being."); Catherine K. Ruckelshaus, *Unemployment Compensation for Victims of Domestic Violence: An Important Link to Economic and Employment Security*, Special Issue 1996 Clearinghouse Rev. 209, 211 & n.7 (1996) (citing studies showing "that women on welfare are often precluded from making the transition into employment because of a male abuser and that women in job training programs or low-income jobs are often forced

to quit because of domestic violence pressures"); *American Psychological Ass'n Report, supra* (violence against women "has a direct impact in keeping welfare recipients from holding jobs and becoming self-sufficient").

A study of women recruited from four domestic violence shelters in Chicago between February and April 1997 found that 46% of the participants' abusers forbade the participants to get jobs. *See Trapped in Poverty/Trapped by Abuse, supra*, at 4-5 (Supp. 1998) (discussing Stephanie Riger et al., University of Ill. at Chicago, *Obstacles to Employment of Women with Abusive Partners*). The same percentage of abusers threatened to prevent participants from going to work or school. *See id.* at 5 (Supp. 1998). Other tactics employed by abusers to prevent their victims from working included threats to sabotage the car (29%), not showing up for child care (37%), lying about the children's health or safety (34%), stealing car keys or money (46%), and refusing to give a ride to work or school (51%). *See id.* at 5 (Supp. 1998); *see also GAO Report, supra*, at 7 (abusers may "inflict[ ] visible signs of abuse, such as bruises, black eyes, and cigarette burns, so the women will be too embarrassed to go to training, work, or a job interview").

Intended or not, however, the impact of gender-motivated violence on women's employment opportunities is drastic. For example, more than half (57.8%) of women surveyed in a 1999 domestic violence study indicated that they were threatened by their partner to the point that they were afraid to go to school or work. *See* Thomas Moore & Vicky Selkowe, The Institute for Wisconsin's Future, *Domestic Violence Victims in Transition from Welfare to Work: Barriers to Self-Sufficiency and the W-2 Response* –

Summary Version (1999) [hereinafter *Barriers to Self-Sufficiency*]. An earlier study reported that 39.7% of women receiving AFDC who were current victims of physical abuse by an intimate partner were actively prevented by those partners from participating in educational and training opportunities (compared with 12.9% of the entire sample). *See Trapped in Poverty/Trapped by Abuse, supra,* at 4, 11, 13 (discussing William Curcio, Passaic County Bd. of Soc. Servs., *The Passaic County Study of AFDC Recipients in a Welfare-To-Work Program: A Preliminary Analysis*).[6] In another study of female applicants for public assistance, 44% of domestic violence victims reported that their abusive ex-partners had prevented them from working. *See id.* at 1-2 (Supp. 1998) (discussing Jessica Pearson et al., Center for Policy Research, *Child Support and Domestic Violence: The Victims Speak Out*).[7]

3. Gender-based violence adversely impacts interstate commerce by causing absenteeism and lost productivity at work.

Gender-motivated violence decreases women's economic opportunities by harming their ability to work productively and causing them to lose time from work and eventually their jobs. *See Trapped in Poverty/Trapped by*

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[6] The sample for this study consisted of 846 women on AFDC in Passaic County, New Jersey, all mandatory participants in education, training and job-related activities between December 1995 and January 1997. *See Trapped in Poverty/Trapped by Abuse, supra,* at 11.

[7] This study involved female applicants for public assistance in four Colorado welfare offices between April and December 1997. *See Trapped in Poverty/Trapped by Abuse, supra,* at 1 (Supp. 1998).

Abuse, supra, at 33 (studies "confirm that abused women do seek employment but are not able to maintain it"); Ruckleshaus, *supra,* at 211 ("Domestic abuse results in hundreds of thousands of lost work days each year").

Congress found that gender-motivated violence "takes its toll in employee absenteeism and sick time for women who either cannot leave their homes or are afraid to show the physical effects of the violence." S. Rep. No. 101-545, at 37 (1990) (footnote omitted). In connection with the enactment of the VAWA, Congress heard testimony that, according to one survey of abused women, over 9% took time off work due to their injuries and over 19% of those severely beaten were required to be absent from work due to their injuries. *See* S. Hrg. 101-939, pt. 1, at 58 (1990) (statement of Helen Neuborne, executive director of NOW Legal Defense and Education Fund).

Other studies available at the time of the VAWA's enactment reflect a much higher rate of absenteeism and lost work productivity as a result of domestic violence. According to a 1988 survey, "Over half of women surveyed in domestic violence shelters reported that they had missed work as a consequence of domestic violence, nearly three-fifths reported that their work was compromised by absenteeism and tardiness related to domestic violence, and nearly one-quarter reported that they lost a job partly because of domestic violence." Amy Johnson & Alicia Meckstroth, Mathematica Policy Research, Inc., *Ancillary Services to Support Welfare to Work* (Chapter on Domestic Violence) 3 (1998) [hereinafter *Mathematica Policy Research Report*] (citing Melanie Shepard & Ellen Pence, *The Effect of Battering on the Employment Status of Women,* 55 Affilia (1988)). Similarly, in a small sample of domestic violence victims in a large metropolitan area,

over half reported having lost at least one job and missed an average of three days of work per month as a result of domestic violence. *See id.* (citing L. Friedman & S. Couper, Victim Serv. Agency, *The Cost of Domestic Violence: A Preliminary Investigation of the Financial Cost of Domestic Violence* (1987)). Another study found that "over 70% of employed battered women are subject to telephone harassment at work by their abusers; over 60% are late to work because of their abuser; over 50% miss work because of abuse; and 70% have difficulty performing their job because of their abusive situation." Shargel, *supra*, at 1854 n.32 (citing Connie Stanley, Domestic Violence: An Occupational Impact Study 17 (July 27, 1992) (unpublished manuscript, on file with the *Yale Law Journal*)).[8]

Studies published after the enactment of the VAWA civil rights remedy similarly reflect a high rate of absenteeism and a decrease in work productivity amongst female employees subjected to domestic violence. A 1999 study conducted in Wisconsin concluded that domestic violence has "a severe negative impact on low-income women's ability to maintain jobs and to succeed at education and training efforts." *Barriers to Self-Sufficiency*, *supra*. Of the 274 domestic violence victims who completed the survey, approximately 30% reported they were fired or lost a job because of domestic violence, and 35% reported that the abuse hurt their education and training

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[8] Likewise, as the Senate Judiciary Committee observed in enacting the VAWA, half of women who are victims of rape lose their jobs or are forced to quit in the aftermath of the crime (*see* S. Rep. No. 103-138, at 54 (1993)) and the other half who remain employed are likely to experience a prolonged period of decreased productivity (*see* S. Rep. No. 101-545, at 33 (1990)).

efforts. *See id.* A study of AFDC recipients in Cook County, Illinois, found the impact of domestic violence on a woman's worklife to be even more severe: the likelihood of a woman working part- or full-time for at least one month during the study period (May through September 1997) was reduced by 87% for women who had experienced domestic violence. *See Trapped in Poverty/ Trapped by Abuse*, *supra*, at 4 (Supp. 1998) (discussing Kristen Shook & Carrie Guthrie, University of Chicago, *Domestic Violence, Economic Hardship, and Employment*). Likewise, in a study of women recruited from domestic violence shelters, 52% of the participants who worked were fired or had to quit because of the abuse, and 85% missed work because of abuse. *See id.* at 5 (Supp. 1998) (discussing Stephanie Riger et al., University of Ill. at Chicago, *Obstacles to Employment of Women with Abusive Partners*).

Individual women's experiences vividly demonstrate how domestic violence jeopardizes a woman's job as well as her life:

- Mary, a counselor for people living with autism, was battered by her partner so badly she required hospitalization. After the relationship ended, Mary's ex-partner repeatedly threatened to kill her, harassed her, and stalked her. Although Mary obtained a civil protection order against her ex-partner and continued to work, she was forced to flee to another city to stay with a friend when her ex-partner came to her home and threatened to kill her. When Mary was leaving her friend's home on her way to work, she saw her ex-partner waiting for her outside. Fearful that her ex-partner might attack her again, Mary returned to her friend's house

and notified the police. Mary's employer fired her two days later, citing her poor attendance record.[9]

- Amy Hall, a teacher's assistant, was physically and mentally abused by her husband, who repeatedly threatened her life and the safety of the children at the school where she was employed. Believing her life was in danger, Amy resigned her job and moved to another state.[10]
- Yvette Pagan was employed as a legal secretary for a law firm. She was also the victim of constant abuse and harassment by her husband. The harassment affected Yvette's ability to concentrate on the job and perform her duties. The abuse continued to escalate and ultimately the husband physically assaulted and threatened to kill Yvette, leaving her distraught and in fear for her life. Although Yvette obtained a temporary restraining order against her husband, the abuse and harassment continued, including constant calls from her husband while she was at work. Although Yvette loved her work, she concluded she had no other choice but to leave her job, and she relocated to another state.[11]

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[9] *See* Robin Runge, *Double Jeopardy: Victims of Domestic Violence Face Twice The Abuse*, 25 Hum. Rts. 19 (1998).

[10] *See Hall v. Florida Unemployment Appeals Comm'n*, No. 96-3079, slip op. at 2 (Fla. Dist. Ct. App. June 27, 1997); *see also* Pamela Coukos, *Connections Between Domestic Violence and Sexual Harassment in the Workplace: Seeking Safety and Equality for Women* 4-5 (1998).

[11] *See Pagan v. Board of Review*, No. A-3964-94T1, slip op. at 2-3 (N.J. Super. Ct. App. Div. Jan. 22, 1997).

4. When domestic violence enters the workplace, it further decreases women's economic productivity.

Abuse often follows women to work, causing further loss in productivity. Current or former husbands and boyfriends commit more than 13,000 acts of violence against women at their workplace each year. *See* Senator Joseph R. Biden, Jr., *Safer Streets, Safer Homes: The Successes of the Violence Against Women Act and the Challenge for the Future* 69 (1999) (citing D. Amfuso, *Deflecting Workplace Violence*, 10 Personnel Journal 66, 73 (1994)). The experiences of individual women illustrate the adverse economic impact domestic violence can have when it extends to the workplace:

- "Mary Hughes" worked for many years as a legal secretary in a law firm. However, at home her husband beat her and threatened to kill her, and the abuse eventually followed her to the office. Mary's husband called her at work several times a day, was rude to the office receptionist, and so disrupted the office routine that, at one point, Mary's boss told her she might have to be fired if this continued. Eventually, when Mary's husband violated a TRO she had obtained against him, Mary relocated to another state and quit her job to escape the abuse.[12]
- Maureen Valdez worked as a pilot-car driver, driving a pilot vehicle under the direction and control of a truck driver. She was subjected to repeated physical assaults and sexual harassment by her former domestic partner, a male co-worker. After he used a

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[12] *See* Ruckleshaus, *supra*, at 209.

> hammer to smash the headlights of her car while she and her children were inside it, parked in the employer's lot, Maureen's employer fired her, purportedly because her former domestic partner might commit other violent acts at work. Soon afterward the employer allowed Maureen to return to work, but fired her again a few months later because her former domestic partner threatened to kill her if she continued to work there.[13]

5. Gender-based violence impairs women's long-term career and educational opportunities.

As the authors of a 1998 report to the U.S. Department of Health and Human Services observed, "[d]omestic violence may depress [women's] socioeconomic and job status attainment over time, compromising their ability to be consistent labor market participants." *Mathematica Policy Research Report, supra,* at 2. Domestic violence victims "are significantly more likely [than non-victims] to have been unemployed at some point, to have held more jobs, to have suffered from a range of mental and physical health problems that can affect work, and to have lower personal incomes." *Id.* at 2-3 (citing Susan Lloyd, *The Effects of Violence on Women's Employment*, 19 Law and Pol'y 139 (1997)).

Petitioner Christy Brzonkala's experience is illustrative of the long-term economic barriers caused by gender-based violence: her rape as a college freshman by two fellow students forced her to leave Virginia Tech, an

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[13] *See* Complaint at 1-4, *Valdez v. Truss Components, Inc.*, No. CV 98-1310 (D. Or. filed Oct. 23, 1998).

institution to which she had been paying tutition, room and board and fees, and from which she expected to earn a degree that would prepare her for the workplace. Without a college degree, Brzonkala will have a more difficult time finding a higher-income job and her future job opportunities are likely to be reduced. Even if she later enrolls in another college and obtains a degree, Brzonkala will suffer the effects of a delayed education and lower overall earnings.

The decreased educational and employment opportunities experienced by Brzonkala as a result of gender-motivated violence are consistent with testimony heard by the Senate during the VAWA hearings: rape is a leading cause of freshmen women dropping out of college, which prevents them from obtaining a degree and competing for higher-income jobs. *See* S. Hrg. 101-939, pt. 2, at 4; *see also Violence Against Women: Victims of the System: Hearings Before the Senate Comm. on the Judiciary*, 102d Cong. 243 (1991) [hereinafter S. Hrg. 102-369] (statement of National Fed'n of Bus. and Prof'l Women, Inc.) ("It is not unusual for a college woman victimized by rape to drop out of school altogether. And, even if a woman does not drop out, she may feel it necessary to interrupt her college career simply to avoid her attacker"). The Congressional testimony of other collegiate rape victims further demonstrates that the adverse impact of Christy Brzonkala's rape on her education and future earning capacity is not unusual:

- After she was raped, Amy Kaylor was unable to concentrate on her studies, dropped out of school for a quarter, and

ultimately lost her funding for her college education.[14]

- Christine Shunk transferred schools after being raped. After a second rape, she flunked classes, delaying her education.[15]

C. Gender-Motivated Violence Increases Women's Reliance On Medical Services.

Congress found that gender-motivated violence also exerts a substantial adverse effect on interstate commerce by increasing medical costs. *See* H.R. Conf. Rep. No. 103-711, at 385 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1839, 1853; *see also* S. Rep. No. 103-138, at 54 (1993) (gender-based crimes and the fear of gender-based crimes affect interstate commerce and the national economy by increasing health expenditures). Congress heard testimony that medical costs related to domestic abuse are estimated to top $100 million per year (*see* S. Hrg. 101-939, pt. 1, at 58 (1990) (statement of Helen Neuborne, executive director of NOW Legal Defense and Education Fund); S. Hrg. 102-369, at 240 (1991)) and that abused women are required to spend twice as many days in bed as other women; are in poor health three times as often as other women; have four times the rate of depression; and attempt suicide five and one-half times more than other women (*see* S. Hrg. 101-939, pt. 1, at 68 (1990) (statement of NOW Legal Defense and Education Fund)).

In short, as both Attorney General Janet Reno and the past president of the American Medical Association, Dr. Robert McAfee, have recognized, domestic violence is a

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[14] *See* S. Hrg. 102-369, at 132 (1991).

[15] *See* S. Hrg. 101-939, pt. 2, at 6 (1990).

major public health issue,[16] even one incident of which "can have lasting, damaging effects on women's health."[17]

Domestic violence directly increases medical costs by inflicting injuries on its victims that require treatment – injuries that are typically more severe than those caused by violence against men. A 1998 study found that the difference between women's and men's rates of physical assault by an intimate partner become greater as the seriousness of the assault increases, and women are more likely to experience serious physical injuries from their intimates than men. *See* Patricia Tjaden & Nancy Thoennes, National Inst. of Justice, *Prevalence, Incidence, and Consequences of Violence Against Women: Findings from the National Violence Against Women Survey* 7 (1998). The study found that while women were two to three times more likely than men to report that an intimate partner threw something that could hurt or pushed, grabbed, or shoved them, women were seven to fourteen times more likely to report that an intimate partner beat them up, choked or tried to drown them, threatened them with a gun, or actually used a gun on them. *See id.* The study also found that women who were raped or physically assaulted by a current or former intimate partner were

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[16] *See* Janet Reno, *Remarks of the Attorney General, Emory Univ. Inst. for Women's Studies, Rosalyn Carter Distinguished Lecture in Pub. Pol'y* (1997) ("Domestic violence is clearly a health issue."); *id.* (family violence is " 'a major public health problem' ") (citing statement of Dr. Robert McAfee).

[17] *See* The Commonwealth Fund, *Women's Health Care: A Mixed Story* (last modified May 5, 1999) <http://www.cmwf.org/media/releases/ksc%5Fwhsurvey%5FRelease0505.asp> (citing statement of Dr. McAfee).

significantly more likely to sustain injuries than men who were raped or physically assaulted by a current or former intimate partner. *See id.* at 12.

In fact, "[m]ore women are treated for injuries resulting from domestic violence than for any other cause of injury"[18] and "compared with women with no history of abuse, abused women have higher levels of health care use."[19] In particular:

- A 1996 National Institute of Justice study found that women make 1.85 million emergency department visits annually as the result of physical abuse by their partners. *See Victim Costs, supra,* at 6. This amounts to 21 percent of all emergency department visits made by women.[20]
- Between 21% and 66% of female patients seeking general medical care report

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[18] Anna E. Waller et al., *Development and Validation of an Emergency Department Screening and Referral Protocol for Victims of Domestic Violence*, 27 Annals of Emergency Med. 755 (1996); *see also Reporting of Domestic Violence, supra,* at 1781 ("Domestic violence is believed to be the most common cause of serious injury to women").

[19] Michael A. Rodriguez et al., *Screening and Intervention for Intimate Partner Abuse: Practices and Attitudes of Primary Care Physicians*, 282 JAMA 468, 468 (1999).

[20] *See* Waller, *supra,* at 755. Other studies have found this percentage ranges from 17% to 30%. *See id. See also* L. Kevin Hamberger et al., *Physician Interaction with Battered Women*, 7 Archives of Fam. Med. 575 (1998) ("In emergency departments, 10% to 35% of female patients seen have been battered"); Rodriguez, *supra,* at 468 ("31% to 54% of female patients seeking emergency services . . . report experiencing intimate partner abuse"); Waller, *supra,* at 754-55, 760 ("It has been estimated that 17% to 30% of all women treated in hospital [emergency departments] are victims of domestic violence").

experiencing intimate partner abuse. *See* Rodriguez, *supra,* at 468.

- "In outpatient practices, almost 1 in 4 women have been battered in the past year, and 39% to 44% of female patients have been battered in their lifetime." Hamberger, *supra* (footnotes omitted).
- The prevalence of domestic violence among patients in ambulatory care settings has been estimated to be between 20% and 30%. *See Reporting of Domestic Violence, supra,* at 1781.
- About half of all female victims of intimate violence (*i.e.*, violence inflicted by a current or former spouse, boyfriend, or girlfriend) report an injury of some type, and about 20 percent of those seek medical assistance. *See Violence by Intimates, supra,* at 17.
- In 1994, about 1.4 million people injured as a result of intentional violence were examined in emergency departments. *See id.* at 22. About one-quarter of these injuries resulted from violence by an intimate. *See id.* Females accounted for 39% of the hospital emergency department visits for violence-related injuries in 1994, but they accounted for 84% of the persons treated for injuries inflicted by intimates. *See id.*

Rape similarly requires victims to seek medical treatment and use healthcare resources on a more frequent basis in the aftermath of an assault.[21] "In one study of rape victims, visits to physicians increased 18% in the year of the assault, 56% in the next year, and 31% in the

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[21] As this Court has previously recognized, "[r]ape is very often accompanied by physical injury to the female and can also inflict mental and psychological damage." *Coker v. Georgia*, 433 U.S. 584, 598 (1977).

following year, compared with pre-assault levels." Robinette Bell et al., The Commonwealth Fund Comm'n on Women's Health, *Violence Against Women in the United States: A Comprehensive Background Paper* 32 (1994) (citing M. Koss et al., *Deleterious Effects of Criminal Victimization on Women's Health and Medical Utilization*, 151 Archives of Internal Med. 342 (1991)).

The medical costs from women's increased reliance on the health care system to treat their physical and psychic injuries from gender-based violence is staggering. Each year between 1992 and 1996, an estimated 57,500 female victims of intimate violence incurred over $61 million in medical expenses. *See Violence by Intimates, supra*, at 21. The Centers for Disease Control and Prevention reports that recent research in Minnesota found that women who are victims of intimate partner violence have an annual health care cost of $1,775 more than that of women who are not victims of intimate partner violence. *See* Centers for Disease Control & Prevention, *October is Domestic Violence Awareness Month* (visited Oct. 18, 1999) <http://www.cdc.gov/ncipc/dvp/fivpt/spotlite/home.htm> (citing C. L. Wisner et al., *Intimate Partner Violence Against Women: Do Victims Cost Health Plans More?* 48 J. of Fam. Prac. (1999)). The National Institute of Justice estimates that rape like that perpetrated against petitioner Christy Brzonkala (or attempted rape) imposes even more healthcare costs per incident than domestic violence: a woman who is raped generally requires $2,700 for medical and mental health care, while an incident of domestic violence on average costs the victim $391 for medical and mental health care. *See Victim Costs, supra*, at 9. The aggregate annual cost to victims for medical and mental health care resulting from rape is about $4 billion;

the aggregate annual cost to victims for medical and mental health care resulting from domestic violence is about $740,000,000. *See id.* at 17.

These studies demonstrate violence against women necessitates enormous additional expenditures of the nation's medical care resources. Particularly in an era of health provider consolidation and at a time when many public and private health care institutions operate in more than one state, these expenditures again demonstrate Congress rationally concluded that gender-based violence substantially affects interstate commerce.

D. Gender-Motivated Violence Increases Lower-Income Families' Reliance On Public Assistance Programs.

By keeping women out of the workforce (*see supra* Part B.2), gender-motivated violence increases lower-income families' need for public assistance as women seek to end an abusive relationship and gain economic independence to create a new life for themselves and their children.

Women victimized by gender-motivated violence may be forced to rely on public assistance because the violence excludes them from the job market,[22] leaving them to "use welfare in their efforts to end the violence in their lives. . . . " Eleanor Lyon, National Resource Ctr. On Domestic Violence, *Poverty, Welfare and Battered Women:*

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[22] In addition, when women become unemployed because of domestic violence, they are unlikely to be found eligible for unemployment compensation and are often forced to go on welfare. *See* Ruckelshaus, *supra*, at 209-10.

What Does The Research Tell Us? (1998) [hereinafter *Poverty, Welfare and Battered Women*] (citing Jody Raphael, *Domestic Violence and Welfare Receipt: The Unexplored Barrier to Employment*, 3 Georgetown J. on Fighting Poverty 29-34 (1995)). For many battered women, welfare is the only income source which allows them to immediately free themselves from financial dependence on their abusers. *See* Diana Zuckerman & Stacey Friedman, Institute for Women's Pol'y Research, *Measuring the Costs of Domestic Violence Against Women: A Summary of the Findings of the Domestic Violence Project* 9 (1998). By "us[ing] welfare strategically in response to their partners' violence," women may gain some measure of independence from their abuser. *Poverty, Welfare and Battered Women, supra; see also* Louise Laurence & Roberta Spalter-Roth, Institute for Women's Pol'y Research, *Measuring the Costs of Domestic Violence Against Women and the Cost-Effectiveness of Interventions: An Initial Assessment and Proposals for Further Research* 13 (1996) ("Those leaving abusive relationships may try to substitute welfare income for income from husbands or from their own earnings during transitional periods when they attempt to establish new lives for themselves and their children"); Wendy Pollack, *Twice Victimized – Domestic Violence and Welfare "Reform,"* Special Issue 1996 Clearinghouse Rev. 329, 330 (1996) ("Without an entitlement to cash and other forms of public assistance, women may not be able to extricate themselves and their children from violent situations").[23]

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[23] However, women's use of welfare to free themselves from abuse may also prompt a renewal or escalation of violence by an abuser trying to regain control. *See Poverty, Welfare and Battered Women, supra* (citing R. Brandwein, *The Use Of Public Welfare by Family Violence Victims: Implications of New Federal*

The sheer number of domestic violence victims who are welfare recipients ensures that the economic burden imposed by gender-motivated violence on the state and federal welfare system is substantial. According to the GAO, research studies "consistently indicate that a sizable proportion of welfare recipients have been or are victims of some type of abuse by an intimate partner." *GAO Report, supra*, at 3. The GAO reports:

> According to these studies, approximately 15 to 56 percent of the women [welfare recipients] surveyed reported that they were current victims or had been victims of physical domestic abuse in the 12 months preceding the survey, and between 55 and 65 percent reported that they had been physically abused by an intimate partner at some point in their lives. . . . These estimates are higher than estimates of the prevalence of domestic violence among the general population.

Id. at 4; *see also* Pollack, *supra*, at 329-30 ("Research supports what domestic violence advocates and welfare-to-work service providers have observed for years – between 50 percent and 80 percent of women receiving AFDC nationwide are past or current victims of domestic violence").

One study conducted from September 1994 to May 1995 found that women receiving AFDC were more likely to have experienced physical abuse and severe aggression, either in the past 12 months or at any point in their life, than women not on welfare. *See Trapped in Poverty/ Trapped by Abuse, supra*, at 25 (discussing Susan Lloyd, *The*

Welfare "Reform," Paper presented at the Fifth Int'l Fam. Violence Research Conference, Durham, N.H. (1997)).

Effects of Violence on Women's Employment). Over half (55.1%) of the women in this study who reported having experienced physical aggression in the past 12 months had received AFDC benefits during that time, compared to 33.3% of the sample.[24] *See id.*

Another study of 734 women receiving AFDC in Massachusetts between January and June 1996 found that almost 20% of respondents had been victims of domestic violence in the 12 months preceding the survey and that about 65% had been victims of domestic violence at some point in their lives. *See GAO Report, supra,* at 5 (citing Mary Ann Allard et al., *In Harm's Way? Domestic Violence, AFDC Receipt, and Welfare Reform in Massachusetts* (1997)).

In its report to the U.S. Department of Health and Human Services, Mathematica Policy Research, Inc. found that welfare recipients are three to three-and-a-half times more likely to suffer from domestic violence than are non-recipients. See *Mathematica Policy Research Report, supra,* at 2 (citing The Commonwealth Fund, *The Health of American Women* (1993) and Susan Lloyd, *The Effects of Violence on Women's Employment,* 19 Law and Pol'y 139 (1997)).

The cycle of domestic violence also ensures that victims will be required to obtain welfare resources on a cyclical and long-term basis.[25] As noted in a report to the

[24] In addition to AFDC, women in this study who reported having been abused at some point in their lives had "significantly higher rates of receipt" of Medicaid and food stamps than women who reported never having been abused. *GAO Report, supra,* at 6.

[25] Women with a history of domestic violence may seek exemptions from recently-enacted restrictions – including time limits – on access to welfare benefits. *See* 42 U.S.C.A. § 602(a)(7) (West Supp. 1999) ("Family Violence Option" contained in 1996 Personal Responsibility and Work Opportunity Reconciliation Act, PL 104-193).

Department of Health and Human Services, victims of domestic violence may cycle on and off welfare more frequently than other welfare recipients, often as a result of the nature of their relationship with an abuser. *See id.* (citing R. Brandwein, *The Use of Public Welfare by Family Violence Victims: Implications for a New Federal Welfare "Reform,"* Paper presented at the Fifth Int'l Fam. Violence Research Conference, Durham, N.H. (1997)). Moreover, among women who had received welfare for two years or longer, those with a lifetime history of victimization were significantly more likely to have had a greater number of welfare spells. *See id.* (citing Ellen Bassuk et al., *The Characteristics and Needs of Sheltered Homeless and Low-Income Housed Mothers,* 276 JAMA 640 (1996)). Among welfare recipients, domestic violence victims were more likely than non-victims to be long-term (five years or longer) welfare recipients. *See id.* (citing Ellen Bassuk et al., *The Characteristics and Needs of Sheltered Homeless and Low-Income Housed Mothers,* 276 JAMA 640 (1996)).

As a result of both the length of time which domestic violence victims are likely to remain on welfare, and the sheer number of domestic violence victims who are welfare recipients, the economic burden imposed by such violence on state and federal welfare systems (and necessarily interstate commerce) is substantial.

CONCLUSION

For the foregoing reasons, *amici* urge that the decision of the en banc Fourth Circuit Court of Appeals be reversed.

Respectfully Submitted,

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APPENDIX

STATEMENTS OF INTEREST OF *AMICI CURIAE*

Equal Rights Advocates

Equal Rights Advocates (ERA) is one of the oldest public interest law firms specializing in educational and litigation efforts to eliminate gender discrimination and secure equal rights. Begun in 1974 as a teaching law firm focused on sex-based discrimination, ERA has evolved into a legal organization with a multi-faceted approach to addressing women's issues. Its current work includes impact litigation, advice and counseling, public education, and public policy initiatives. ERA has been engaged in both educational and litigation efforts to eliminate gender-motivated violence. It has participated as counsel and amicus curiae in numerous cases in which women have been subjected to gender-motivated violence.

American Association of University Women

For over a century, the American Association of University Women (AAUW), an organization of 150,000 members, has been a catalyst for the advancement of women and their transformations of American society. In more than 1,500 communities across the country, AAUW members work to promote education and equity for all women and girls, lifelong learning, and positive societal change. AAUW plays a major role in activating advocates nationwide on AAUW's priority issues, including: gender equity in education, reproductive choice, social security, and workplace and civil rights issues. AAUW believes that making schools, streets, homes, and workplaces safe

for women and girls is fundamental to achieving equity in education, in the workplace, and in all areas of their lives.

American Federation of State, County and Municipal Employees, AFL-CIO

The American Federation of State, County, and Municipal Employees, AFL-CIO (AFSCME) is a labor organization representing approximately 1.5 million working men and women throughout the United States, Puerto Rico, and Panama. Approximately 53% of AFSCME's members are women. AFSCME is the largest union of public employee and health care workers in the country. AFSCME develops, initiates, assists, and defends litigation in state and federal courts and before administrative agencies addressing issues concerning workers' rights, women's rights, and civil rights. AFSCME diligently educates union members about domestic and workplace violence and actively supported passage of the Violence Against Women Act.

Break the Cycle

Break the Cycle is a Los Angeles based, nonprofit, public interest organization whose mission is to end domestic violence by working proactively with youth. We further our mission by providing law-based education, free legal services, advocacy and support services to young people, ages 12-22. Founded in March, 1996, Break the Cycle has been recognized both locally and nationally as a model organization providing groundbreaking social

justice work for young people affected by domestic violence and sexual assault. Each year, Break the Cycle educates thousands of young people about their legal rights and responsibilities regarding domestic violence and provides free advice, counsel and representation to hundreds of young people in need of legal protection. In furtherance of our mission, Break the Cycle supports the Violence Against Women Act and the Civil Rights Remedy and joins as amicus curiae in the case of *Brzonkala v. Morrison*, asserting that Congress acted within the scope of its Commerce Clause authority when it enacted the VAWA civil rights provision.

Business and Professional Women/USA

Business and Professional Women/USA (BPW/USA), is a national, non-profit, non-partisan organization, headquartered in Washington, DC, that promotes equity for all women in the workplace through advocacy, education and information. BPW/USA represents 70,000 working women, with members in nearly 2,000 local organizations across the country. BPW/USA, founded in 1919, has helped to pass much of the nation's landmark legislation relating to economic equity, civil rights and health care. Because of the detrimental effect violence against women has on women's performance in the workplace and on the corporate bottom line, BPW/USA has been a leading advocate for legal remedies protecting women from violence. BPW/USA advocated for the passage of the Violence Against Women Act of 1994 (VAWA) – of which the civil rights provision is an essential part.

The Junior League of Birmingham, Inc.

The Junior League of Birmingham, Inc., is a 501(c)(3) organization of women committed to promoting volunteerism, developing the potential of women, and improving communities. Incorporated in Jefferson County, Alabama, in 1922, the Junior League of Birmingham has a membership of over 2,200 women and will give over 50,000 volunteer hours and $357,000 to more than 30 projects in 1999. These projects strive to improve the safety, economic security, education, health, sense of community, and spirit of volunteerism of women and children in the Birmingham area. Many of the safety projects deal specifically with the problem of violence against women. Additionally, the League recognizes that economic security, education, health, sense of community, and spirit of volunteerism are also adversely affected by gender based abuse and violence. The Junior League of Birmingham believes that safe and stable homes, neighborhoods, schools, and communities are an integral factor in affording women the opportunity to develop to their full potential. Consequently, the Junior League of Birmingham actively supports legislation, such as the Violence Against Women Act, which encourages environments free from abuse and violence.

Alaska Network on Domestic Violence and Sexual Assault

The Alaska Network on Domestic Violence and Sexual Assault (ANDVSA) is a statewide coalition of twenty-one domestic violence and sexual assault programs across

Alaska. ANDVSA is committed to the elimination of personal and societal violence in the lives of women and children. Since its founding in 1980, ANDVSA has been involved in work to further this goal including: coalition building at the state and local levels; fund-raising; support of locally-based programs in public education, policy development, legislative advocacy, training and technical assistance, staff education and planning and coordination. In 1996, ANDVSA developed a Legal Advocacy Project to increase the ability of victims of domestic violence and sexual assault to effectively access and participate in the criminal and civil justice systems. ANDVSA supports the petitioners in *Brzonkala v. Morrison* in order to insure that the civil rights remedy as well as other provisions of VAWA remain an option for domestic violence victims.

American Medical Women's Association

The American Medical Women's Association is a national organization of 10,000 women physicians dedicated to promoting women's health and fostering the woman physician, with branches across the United States. AMWA encourages its members, branches, and national officers to support and promote the end of violence against women of all ages. AMWA deplores the victimization and abuse of women and advocates development and implementation of an education curriculum at the medical school and post graduate levels as well as development of programs in hospitals and health care facilities that provide appropriate care and support for victims of domestic violence.

The Brennan Center for Justice at NYU School of Law

The Brennan Center for Justice at New York University School of Law is a nonpartisan institute dedicated to uniting thinkers and advocates in pursuit of inclusive and effective democracy. The Center's mission is to develop and implement an innovative agenda of scholarship, public education, and legal action that promotes equality and human dignity, while safeguarding fundamental freedoms. The Center's Poverty Program works to ensure access to justice for the poor and to promote economic opportunity with a particular emphasis on fair and decent work. The Center takes an interest in this case because the Fourth Circuit's invalidation of the Violence Against Women Act, unless corrected by this Court, will harm poor women nationwide since gender motivated violence exacerbates the problems of poverty, causing poor women to turn increasingly to government benefits and social services for their survival.

The California State Public Affairs Committee of Junior Leagues

Since 1971, the State Public Affairs Committee of the Junior Leagues of California has represented the interests of its member leagues, and the groups or issue areas addressed by their projects, to policy makers at the State and local levels. The collective voice of this non-partisan group represents over 13,500 women in sixteen communities across the state. In 1998-1999, Junior Leagues across the State have committed 220 volunteers and $114,200 to preventing violence in our communities.

The California Women's Law Center

The California Women's Law Center (CWLC) is a private, nonprofit public interest law center specializing in the civil rights of women and girls in California. We work in five priority areas: Sex Discrimination, Women's Health & Reproductive Rights, Child Care, Family Law and Violence Against Women. Since its inception in 1989, the CWLC has worked to end violence against women, in all its forms, and to protect the legal rights of victims of gender-based crimes. We supported the passage of the Violence Against Women Act, and have educated attorneys, organizations, legislators and the clients we serve about its protections and, in particular, about the Civil Rights Remedy.

Center for Advancement of Public Policy

The Center for Advancement of Public Policy (The Center) is a non-partisan, non-profit policy organization concentrating on women's equity. The Center was founded in 1991, and has a national constituency. The Center actively participates in crafting public policy to protect the rights of women, including the right to be free from violence. Activities include participation in the coalition active in helping to craft the Violence Against Women Act, and raising public awareness of the law and its meaning for women.

Center for Women Policy Studies

The Center for Women Policy Studies (The Center) is a national nonprofit, multiethnic and multicultural feminist policy research and advocacy institution. The Center has been a leader in research, policy analysis and advocacy on violence against women since its founding in 1972. In 1991, the Center published *Violence Against Women as Bias Motivated Hate Crime: Defining the Issues*, which placed rape and battering in the context of bias motivated hate crimes and contributed to the creation of the civil rights remedy in the Violence Against Women Act of 1994. The Center was part of a coalition that assisted in drafting 42 USC § 13981(c) and our testimony in support of the legislation emphasized that, as with other hate crimes, the acts and threats of violence against each woman terrorizes and intimidates the entire class – all women – and thus impedes all women's economic opportunities, educational aspirations and health.

Center on Hate & Extremism

The California based Center on Hate & Extremism (the Center) is a national independent public policy organization organized in 1996. Its mission is to promote intergroup relations through research, legislation, litigation and policies that aid in the reduction and prevention of violence and terrorism committed on the basis of race, religion, color, national origin, sexual orientation, disability and gender. The civil rights remedy in the Violence Against Women Act at issue in *Brzonkala* is, in the Center's view, an important tool in reducing, preventing and remedying gender-based violence.

The Coalition for Humane Immigrant Rights of Los Angeles

The Coalition for Humane Immigrant Rights of Los Angeles (CHIRLA) is a nonprofit organization committed to the advancement of the rights of immigrants and refugees. As a multiethnic coalition of community organizations and individuals, CHIRLA aims to foster greater understanding of issues that affect immigrant communities, provide a neutral forum for discussion, and unite immigrant groups to more effectively advocate for positive change. Founded in 1986, CHIRLA promotes laws that protect the civil rights of immigrants, including immigrant women. CHIRLA has a special program that focuses on violence against immigrant women and assists women with petitions under the immigration provisions of the Violence Against Women Act. CHIRLA supports the preservation of the civil rights remedy of the Violence Against Women Act as an essential tool in ending violence against women.

The Employment Law Center, A Project of the Legal Aid Society of San Francisco

The Employment Law Center (ELC) is the principal project of the Legal Aid Society of San Francisco which was founded more than eighty years ago to provide legal assistance to poor immigrants in San Francisco. For the last two decades, the ELC has focused almost exclusively on employment-related issues that affect the working poor. A pioneer in the employment law field, the ELC is nationally recognized for its expertise in this area. The ELC has represented women in numerous gender-based discrimination and harassment cases, including *U.S. v.*

Virginia, 518 U.S. 515, 116 S. Ct. 2264 (1996); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 114 S. Ct. 367 (1993); *California Federal Savings and Loan Association v. Guerra*, 479 U.S. 272, 107 S. Ct. 683 (1987); and *Johnson Controls, Inc. v. California Fair Employment and Housing Commission*, 218 Cal.App.3d 517 (4th Dist. 1990). Most recently, the ELC has expanded its advocacy for women by focusing on issues of domestic violence. Through its Domestic Violence and Employment Project, the ELC represents victims of domestic violence who confront workplace issues as a result of that violence.

Feminist Majority Foundation

The Feminist Majority Foundation ("Foundation") is a non-profit organization with offices in Arlington, Virginia and Los Angeles, California. The Foundation is dedicated to eliminating sex discrimination and to the promotion of equality, women's rights and safe access to abortion and birth control and non-violence. The Foundation runs the National Center for Women & Policing, which works to improve police response to violence against women. The National Center conducts training programs on responding to violence against women and works for reforms of police practice in responding to and investigating violence against women. The Feminist Majority, the sister organization to the Foundation, worked for passage of the Violence Against Women Act and strongly supports the ability of women to sue their attackers. Such suits are vital to the victims and to the goal of reducing violence against women.

The General Federation of Women's Clubs

The General Federation of Women's Clubs (GFWC) is the world's largest and oldest women's volunteer organization. Members include business owners, teachers, elected officials, homemakers, corporate executives, college students and retirees. GFWC members are united by a dedication to community improvement through volunteer service. GFWC is a nonpartisan organization, whose members tackle issues such as domestic violence, welfare reform, education, women's health, and children's rights. Our 250,000 members nationwide network to accomplish policies on the local, state, and federal levels. Founded in 1890, GFWC has over 1 million members worldwide in 20 countries.

Harriett Buhai Center for Family Law

The Harriett Buhai Center for Family Law (the Center) is a non-profit public interest organization that has for over 16 years provided family law and domestic violence assistance to low-income families in Los Angeles. Its pro per program is run with the assistance of over 200 volunteer lawyers, volunteers and students who are trained by the Center. The mission of the Center is to assure the families it serves access to the court by teaching them to be their own legal advocates. For over 16 years, self-empowerment of low-income persons has been a key objective of the Center, in particular the many victims of domestic violence it serves. The Center's Domestic Violence Law Project (DVLP) provides direct legal services to 1,200 women and children each year with domestic violence issues. In addition, the DVLP

conducts community education programs and is preparing a comprehensive domestic violence manual for use by shelter workers.

House of Ruth Domestic Violence Legal Clinic

The House of Ruth Domestic Violence Legal Clinic (The Legal Clinic) provides legal services for victims of domestic violence. This includes representation in protective order cases, divorce and custody proceedings; assistance for victim-witnesses in criminal prosecutions; and advocacy on policy matters to enhance victim protection and increase offender accountability. The Legal Clinic serves victims throughout the State of Maryland and has seven offices, including five walk-in clinics located in Maryland courthouses. The Legal Clinic is part of a larger agency, the House of Ruth Baltimore, which provides a comprehensive range of services including shelter, women's counseling, children's counseling, batterers' education, and training. House of Ruth staff work with many victims who have fled to Maryland from other states to protect themselves and their children from abuse. Countless others leave jobs and assets behind in an effort to find safety. Too often, serious violations of victims' civil rights are given inadequate redress by State courts and institutions. The House of Ruth Domestic Violence Legal Clinic supports the Petitioners in *Brzonkala v. Morrison* because we believe a federal civil rights action is necessary to provide justice to battered women.

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW)

The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) is a labor organization representing approximately 1.3 million active and retired members. The UAW has a long and proud history as an advocate of civil rights, and the rights of women in particular, through collective bargaining, membership and community education, and litigation. The UAW most recently participated as a party before this Court in a case presenting gender discrimination issues in *UAW v. Johnson Controls*, 499 U.S. 187 (1991), in which the UAW successfully advocated the position that employers violate Title VII in adopting so-called "fetal protection" rules barring women from particular jobs. The UAW also strongly supported passage of the Violence Against Women Act in Congress.

The Junior League of El Paso, Inc.

The Junior League of El Paso, Inc. is an organization of women committed to promoting volunteerism and to improving the community through the action and leadership of trained volunteers. Its purpose is exclusively educational and charitable. The Junior League of El Paso, Inc. believes that the cycle of family violence can only be broken through programs and projects directed at increasing public awareness and education on the issue of domestic violence and abuse, and therefore joins in supporting the civil rights remedy of the Violence Against Women Act.

The Junior League of Oakland-East Bay, Inc./The Junior League of Saint Paul, Inc./The Junior League of San Francisco, Inc.

The Junior Leagues of Oakland-East Bay, Inc., Saint Paul, Inc. and San Francisco, Inc. are non-profit organizations of women committed to promoting volunteerism, developing the potential of women, and improving the community through the effective action and leadership of trained volunteers. They have a combined membership of 5,000 women.

The focus of the Junior League of Oakland-East Bay is Children at Risk. Frequently, violence against women negatively impacts the lives of children if these women are mothers, older sisters, grandmothers, or other important figures in these children's lives. This league supports non-profit agencies in providing volunteers and funding to assist them in helping children whose lives are harmed by the impact of domestic violence and child abuse. This league believes both violence prevention and intervention are critical components to helping children be raised in a safe and caring environment.

Founded in 1917, the Junior League of Saint Paul offers membership open to all women with an interest in volunteerism and a commitment to community service. During 1997-1998, this league gave 20,600 hours of service to its community. Their 80th anniversary project brought blazing red, life-sized silhouettes, created in memory of Minnesota women killed by domestic violence, to the Silent Witness National Initiative's March on Washington, October, 1997. Currently, this project raises awareness about domestic violence in Minnesota. In addition, one of their goals is to reduce the incidence of child

abuse in the Saint Paul area through two joint programs with Children's Hospital and Clinics: "Shaken Baby Syndrome" educates youth, parents and professionals about the syndrome, and "First Steps" mentors teen mothers.

Founded in 1911, the Junior League of San Francisco has provided over 6 million volunteer hours throughout this century, and over $18 million in community grants and services. All projects and efforts are directed toward the focus area of Family Preservation: Supporting Families and Preventing Violence. This league has maintained the Silent Witness Program and crafted domestic violence legislation recently signed into law in California.

Junior League of San Diego, Inc.

The Junior League of San Diego, Inc. is a non-profit charitable organization of women committed to promoting volunteerism, developing the potential of women and improving the community through the effective action and leadership of trained volunteers. For the past seven years our focus has been breaking the cycle of domestic violence, and we have worked on countless projects in our community to combat violence against women as well as advocated for legislation directed at same. The Junior League of San Diego was formed in 1929, and serves the entire San Diego County.

National Alliance of Sexual Assault Coalitions

The National Alliance of Sexual Assault Coalitions ("NASAC"), organized in September of 1995, is a national member organization of state sexual assault coalitions

which focuses on public policy and public education to end sexual violence. NASAC advocates for the needs, rights and concerns of sexual assault victims. In furtherance of those goals, NASAC has a strong interest in the availability of legal redress for victims of rape and sexual assault.

National Association of Commissions for Women

The National Association of Commissions for Women (NACW), formerly the Interstate Commissions on the Status of Women, was established in 1970 and presently represents more than 270 city, county and state commissions nationwide. NACW obtained United Nations NGO status in June, 1998. It serves as a national resource for American women to facilitate collaborative efforts and provides technical expertise to its members and associate/affiliate organizations. Through its member commissions, the NACW advocates on behalf of women on a myriad of public policy issues, including economic and community development programs that promote and enhance the economic well-being of women. Consistent with NACW's mission of supporting and achieving equity and justice for all women, NACW supports the enactment of the Violence Against Women Act's civil rights remedy.

National Association of Human Rights Workers

The National Association of Human Rights Workers (NAHRW) was organized in 1947 to advance the science of intergroup relations and to facilitate the exchange of

ideas and information among individuals and organizations devoted to combating racial, ethnic, religious, gender and other forms of discrimination. NAHRW is a 501(c)(3) organization.

NAHRW is made up of professional staff workers and members of governing boards of human rights agencies and commissions; teachers of intergroup relations at colleges and universities; and other individuals who share a commitment to justice and human dignity.

National Coalition Against Domestic Violence

Founded in 1978, the National Coalition Against Domestic Violence (NCADV) is a grassroots organization representing a national network of over 2,000 local programs and state coalitions that serve battered women and their children. NCADV serves as a national information and referral center for the general public, the media, battered women and their children, public and private agencies and organizations. NCADV sponsors "NATIONAL DOMESTIC VIOLENCE AWARENESS MONTH," in which communities across the country organize special events and activities to draw attention to the ubiquity of domestic violence and work that is being done to end it. NCADV, through its Public Policy Office in Washington, D.C., supported the passage of the Violence Against Women Act.

NCADV is committed to ensuring the safety of all women, be it from domestic violence, sexual assault or stalking. NCADV believes that women have a right to

equal opportunity and treatment in education, employment, and all economic endeavors. When violence is present in a woman's life, it greatly inhibits her ability to participate in social and economic activities and creates a barrier to her social, emotional, and economic development. Women who are victims of gender-based violence often face difficulty in maintaining economic stability for themselves and their children. NCADV therefore urges the Supreme Court to protect victims of gender-based violence by upholding the civil rights remedy included in the Violence Against Women Act of 1994 and reversing the decision of the Fourth Circuit Court of Appeals.

National Council of Jewish Women

The National Council of Jewish Women, Inc. (NCJW) is a volunteer organization, inspired by Jewish values, that works through a program of research, education, advocacy and community service to improve the quality of life for women, children and families and strives to ensure individual rights and freedoms for all. Founded in 1893, the National Council of Jewish Women has 90,000 members in over 500 communities nationwide. Given NCJW's early and active involvement in the passage of the 1994 Violence Against Women Act and NCJW's *National Resolutions*, which supported "the elimination of, and protection from, all forms of harassment, violence and abuse against women everywhere," we join this brief.

National Partnership for Women & Families

The National Partnership for Women & Families is a nonprofit, nonpartisan organization that promotes fairness in the workplace, quality health care, and policies that help women and men meet the dual demands of work and family. Founded in 1971 as the Women's Legal Defense Fund, the National Partnership has grown from a small group of volunteers into one of the nation's most powerful and effective advocates for women and families. The National Partnership has worked to advance the rights and interests of women, including victims of domestic violence, through public education, provision of technical assistance to federal and state policymakers and advocates, participation in cases as amicus curiae, and through the founding of My Sister's Place, a Washington, DC shelter for battered women.

National Women's Health Network

Founded in 1975, the National Women's Health Network is an independent, membership-based, non-profit organization dedicated to safeguarding women's health rights and interests. The Network provides accurate, unbiased health information to women and advocates for national health policies that address women's health needs. The Network's Health Information Clearinghouse responds to more than 5,000 requests annually, both from members and the general public. As an advocate for women's health, the Network is concerned with both the health impact of domestic violence and the need to improve the response of the health care system to survivors of domestic violence. The Network endorsed the

Violence Against Women Act and supports the law, including the VAWA civil rights provision.

Public Counsel

Public Counsel is a non-profit public interest law office dedicated to advancing equal justice under law by delivering pro bono legal services to indigent and under represented children and adults throughout Los Angeles County. It was established in 1970. In 1998, Public Counsel provided legal representation to over 18,000 individuals and non-profit organizations. Legal representation is provided to clients with a variety of legal needs, including immigrant women, men and children who are victims of domestic violence and who are eligible for relief under the immigration provisions of VAWA. In addition to providing direct legal representation to victims of domestic violence, when necessary, Public Counsel assists victims of domestic violence in obtaining temporary shelter and access to government benefits. Since the enactment of VAWA, Public Counsel has provided numerous legal trainings addressing the immigration provisions of VAWA to public and private organizations.

Public Law Center

The Public Law Center (PLC), the only private bar, public interest law firm in Orange County, California, was founded in 1989. PLC provides free civil legal services to low income Orange County residents through its staff and pro bono attorneys. Additionally, PLC strives to ensure that access to justice is not limited by institutional or cost barriers by challenging systemic injustices

through litigation and other forms of advocacy. The nine person staff places cases with approximately 1,300 pro bono attorneys each year.

Western Center on Law and Poverty, Inc.

The Western Center on Law and Poverty (Western Center) is a non-profit legal services agency which provides free legal representation in the courts, the state Legislature, and various administrative forums to low-income persons in California. Western Center was founded in 1967 and specializes in impact litigation, advocacy, and training in the areas of public benefits, health care, and housing. Many of our low-income clients are single mothers, and many of them are domestic violence survivors. We have litigated at least one case under the immigration provisions of the Violence Against Women Act, and frequently are called upon to address the intersection of domestic violence and poverty. For example, we have written and provided training to advocates on the specific provisions relating to time limits, work requirements and supportive services for domestic violence survivors in California's welfare program. Likewise, last term we were co-counsel in *Saenz v. Roe*, 119 S. Ct. 1518 (1999), in which this Court held California's durational residency requirement for welfare benefits unconstitutional. Many class members and some of the named plaintiffs in that case were women who needed welfare benefits in California as a result of domestic violence.

Wider Opportunities for Women

Wider Opportunities for Women (WOW) works nationally and in its home community of Washington, D.C. to achieve economic independence and equality of opportunity for women and girls. For more than 30 years, WOW has helped women learn to earn, with programs emphasizing literacy, technical and nontraditional skills, the welfare-to-work transition and career development. Since 1964, WOW has trained more than 10,000 women for well paid work. WOW strongly supports victims of domestic violence in their struggle to achieve justice and economic self-sufficiency.

Women & Philanthropy

Women & Philanthropy is an association of grantmakers, women and men who recognize that effective solutions to our most pressing societal issues cannot be developed without specific attention to the critical needs and distinctive talents of all women. Collectively, regardless of race, ethnicity, age or sexual orientation, women have a vested interest in ensuring that their voices lend depth and meaning to debates that frame the issues we face as a society. By joining in support of the petitioners in *Brzonkala v. Morrison*, Women & Philanthropy supports women's right to be free of gender-motivated violence and participate fully in the national economy.

Women Employed

Women Employed is a national association of working women based in Chicago, with a membership of 2000.

Since 1973, the organization has assisted thousands of working women with problems of sex discrimination and harassment, monitored the performance of equal opportunity enforcement agencies, and developed specific, detailed proposals for improving enforcement efforts. Women Employed strongly believes that gender-motivated violence is a civil rights violation and a form of discrimination against women that adversely affects interstate commerce by limiting women's employment opportunities.

Women Lawyers Association of Los Angeles

The Women Lawyers Association of Los Angeles (WLALA), established in 1918, now with more than 1,100 members, is dedicated to promoting the full participation of women lawyers and judges in the legal profession, maintaining the integrity of our legal system by advocating principles of fairness and equality and improving the status of women in our society. WLALA has always been committed to assisting women who are victims of domestic violence and currently offers assistance to those women by maintaining a clinic which provides them with free legal advice.

The Women's Bar Association of Illinois

The Women's Bar Association of Illinois (WBAI) was established in 1914 by nine women lawyers in the Chicago Metropolitan area to promote the interests and welfare of women lawyers and also to aid in the enactment of legislation for the common good. Its earliest

efforts were devoted to seeking passage of a constitutional amendment permitting women to vote. In 1939, the WBAI pressed for legislation allowing women to serve on juries.

The WBAI has regularly taken positions on various social issues and lobbied for the passage of legislation that protects the reproductive and health care rights of women and eliminates gender inequities in the workplace. The Association is also committed to improving the economic lives of women in our community. By its active advocacy, the WBAI gives voice to thousands of disenfranchised women and girls as well as to women attorneys. The Association previously successfully argued against sex discrimination in law firm partnership decisions before this Court in an amicus brief filed in *Hishon v. King & Spaulding*.

In the past decade, the WBAI has taken a special interest in helping to end violence against women by conducting public awareness programs, partnering with organizations and shelters that provide services to battered and homeless women, and training lawyers to obtain orders of protection for women in danger. The Violence Against Women Act, which the WBAI has featured in its recent Newsletters, recognizes women's unique vulnerability to acts of criminal sexual assault and offers remedies to rape victims that would not otherwise be available. The WBAI membership joins in this amicus effort to ensure that essential protections afforded to women by the VAWA will be preserved.

The Women's Law Center of Maryland, Inc.

The Women's Law Center of Maryland, Inc. (WLC), established in 1971, advocates for an equal playing field in the law for women and children. For more than a quarter of a century, the WLC has fought and won many battles to protect and preserve the rights of women by educating the public and the judiciary on the effects of legal decisions affecting women, by monitoring compliance with the law, by seeking to change unjust laws and unjust lawmaking, and by implementing innovative programs to pave the way for systemic change. The WLC is participating as an amicus in *Brzonkala v. Morrison* because it supports the right of women to be free from gender-based violence.

(16) (12)

Nos. 99-0005 and 99-0029

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

CHRISTY BRZONKALA,
Petitioner,

—v.—

ANTONIO MORRISON, et al.,
Respondents.

UNITED STATES OF AMERICA,
Petitioner,

—v.—

ANTONIO MORRISON, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF *AMICI CURIAE* ON BEHALF OF INTERNATIONAL LAW SCHOLARS AND HUMAN RIGHTS EXPERTS IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*

Amici curiae are 36 international legal scholars and human rights experts.[1] *Amici* include law professors and scholars who have studied and contributed as jurists to the development of the international law respecting human rights and the recognition of violence against women as a violation of human rights. Some of the *amici* currently hold positions as independent experts elected to human rights treaty bodies of the United Nations and the Inter-American system that are charged with implementing human rights, and one has recently completed a report on violence against women as a United Nations Special Rapporteur. The *amici* also include human rights experts and advocates, who have dedicated their lives to building the legal foundations of universal human rights protections, and have participated in various ways to the drafting and adoption of major UN and Inter-American instruments recognizing violence against women, inflicted by private persons as well as by officials as one of the paramount violations of international human rights today. Finally, there are among the amici international law scholars who have focused on the relation between the constitutional powers of the federal government and the international commitments of the United States.

Amici underscore the importance of sustaining Congressional power to enact the Violence Against Women Act (VAWA), and particularly the federal civil rights action, as fundamental to fulfilling the United States' mutual binding commitments under international law both to the elimination of violence against women and to respect for the rule of law.

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[1] The background and work of the *amici* is contained in the attached letter to the Clerk of the Court. No counsel for any of the parties authored any part of this brief and there were no monetary contributions to the preparation and submission of the brief.

SUMMARY OF ARGUMENT

Congress has unquestioned authority to enact legislation to meet both international treaty and customary law obligations, and need not state the sources of its authority for legislation to be valid. U.S. ratification of the International Covenant on Civil and Political Rights (ICCPR), and other treaties, empowers Congress to enact legislation implementing the treaty. The text of the treaty, in conjunction with subsequent unanimous and binding interpretations by the international community, make clear that the ICCPR requires the U.S. to provide protection from gender-based violence from both private persons and public officials. Moreover, that the Executive Branch has confirmed this view in international proceedings is entitled to great deference.

In addition, the emergence in customary international law of a clear norm recognizing women's right to live free of gender-based violence, provides additional constitutional authority for the enactment of the federal civil rights cause of action at issue in this case. Under Article III, section 2, clause 1 of the Constitution, the federal courts have authority over all cases arising under the "laws of the United States" which include customary international law. In particular, Congress has authority to enact VAWA under both the Define and Punish Clause and under its power under the Necessary and Proper Clause to enact legislation enabling the federal courts to exercise its Article III jurisdiction over violations of customary international law.

It is also well-settled and fundamental to the US constitutional system that, whenever possible, domestic law should be interpreted so as to enable the U.S. to fulfill its international obligations. This principle strongly supports an interpretation of both the Commerce Clause and Section 5 of the Fourteenth Amendment that would confirm Congressional authority to enact VAWA and similar implementing legislation

ARGUMENT

I. VAWA Is A Constitutional Exercise Of The Congressional "Treaty Power" Which Implements U.S. Obligations Under The International Covenant On Civil And Political Rights (ICCPR) To Redress Gendek-Based Violence.

A. Congress Is Constitutionally Authorized To Enact Legislation To Fulfill U.S. Treaty Obligations.

It is well established that Congress has the authority to enact legislation that is "necessary and proper" to meet the United States' obligations under ratified treaties, and that the existence of a valid treaty gives Congress authority to legislate over the subject matter thereof. *Missouri v. Holland*, 252 U.S. 416 (1920). This is so whether or not the Constitution provides another source of Congressional power. *Id.* at 432 ("[I]t is not lightly to be assumed that, in matters requiring national action, a 'power which must belong to and somewhere reside in every civilized government' is not to be found.") (internal citations omitted). *See also*, *Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924) (The treaty power "extend[s] to all proper subjects of negotiation between our government and other nations.").

Congress need not state the ground of authority for legislation so long as a court is able to "discern some legislative purpose or factual predicate that supports the exercise of that power." *E.E.O.C. v. Wyoming*, 460 U.S. 226, 244, n.18 (1983). This principle applies whether Congress has identified a different

source of authority for the legislation, or none at all. *Id.* at n.18. Indeed, as long as "Congress had such authority as an objective matter, whether it also had the specific intent to legislate pursuant to that authority is irrelevant." *Crawford v. Davis*, 109 F.3d 1281, 1283 (8th Cir. 1997); *Coger v. Bd. of Regents of the State of Tenn.*, 154 F.3d 296, 302 (6th Cir. 1998); *Ramirez v. Puerto Rico Fire Serv.*, 715 F.2d 694, 698 (1st Cir. 1983).

B. The ICCPR Guarantees The Right To Be Free From Gender-Based Violence and Obligates States Parties To Provide Remedies For Private And Official Gender-Based Violence.

The International Covenant on Civil and Political Rights ("ICCPR" or "Covenant"), which was ratified by the United States on June 8, 1992,[1] guarantees a range of rights that parallel Fourteenth Amendment rights and encompass the right to be free from gender-based violence. Moreover, under the Covenant, the U.S. committed itself to prevent not only official action perpetrating violence against women, but also to protect individuals from privately-inflicted violence and to provide remedies therefor. The VAWA cause of action is such a remedy.

A treaty is interpreted according to the "ordinary meaning" of its terms in their "context[s] and the light of its object and purpose;" moreover, under international law, subsequent agreements and State practice are particularly important determinants of treaty interpretation. [2] All of these sources

[1] International Covenant on Civil and Political Rights, *ratified by U.S.* June 8, 1992 , 999 U.N.T.S. 171 (1966) [hereinafter "ICCPR at __"].

[2] Vienna Convention on the Law of Treaties, *entered into force* Jan. 27, 1980, at art. 31, U.N. Doc. A/Conf. 39/27 at 289 (1969), 1155 U.N.T.S. 331, [hereinafter "Law of Treaties at __"]. ("The Vienna Convention on the

confirm that the Covenant guarantees the right to be free from gender-based violence.

1. The ICCPR Requires States Parties to Redress Privately Inflicted Gender-Based Violence.

The ICCPR requires the U.S., as a State Party, to protect against both official and private violations of the Covenant. Art. 2(1) of the ICCPR obligates the State to both "respect and to *ensure* to all individuals within its territory . . . the rights recognized in the present Covenant, without distinction of any kind, such as . . . sex . . ." ICCPR at art. 2. (emphasis added). The Human Rights Committee, which is the treaty body charged with interpreting the Covenant,[3] explained in General Comment 3 that the States' obligations under the treaty are "not confined to the respect for human rights, [rather, States Parties] have also undertaken to ensure the enjoyment of these rights to all individuals under their jurisdiction." United Nations, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U. N. DOC HRI/OEN/I/Rev.2 (29 March 1996) at Part I, Comment 3(1) [hereinafter "*Compilation* at Part___, Comment (or Recommendation) ___"]. The term "respect" in human rights treaties imposes a

Law of Treaties, concluded in 1969, is the principle authoritative source of the law of treaties..."); LOUIS HENKIN, RICHARD C. PUGH, OSCAR SCHACHTER, HANS SMIT, INTERNATIONAL LAW 416 (2nd ed. 1987). ("[T]he Department of State, in submitting the Convention to the Senate, stated that the Convention 'is already recognized as the authoritative guide to current treaty law and practice.'"(citing S. EXEC. DOC. L. at 1 (1971))); *see also*, Jordon J. Paust, *The Other Side of Right: Private Duties Under Human Rights Law*, 5 HARV. HUM. RTS. L. J. 51, 308, 381-82.(1992) [hereinafter "J. Paust, *Private Duties* at ___"].

[3] ICCPR at art. 40(4).

negative obligation; "respect" used in this context refers to the State obligation to refrain from directly interfering with the exercise of a right or infringing upon a right. The term "ensure," however requires a State, *inter alia*, to protect individuals from private actors infringing on the right; thus, it imposes a positive obligation on States.[4]

General Comment 4 makes clear that the guarantee of equal enjoyment of the rights enumerated in Article 3 of the Covenant "requires not only measures of protection but also affirmative action designed to ensure the positive enjoyment of rights." *Compilation* at Part I, Comment 4(2). General Comment 18 requests States Parties to report to the Human Rights Committee any problems of "discrimination . . . practiced either by public authorities, by the community, or *by private persons or bodies*." *Compilation* at Part I, Comment 18 (9) (emphasis added).[5]

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[4] The "respect" and "ensure" language also appears in the American Convention on Human Rights, *entered into force* July 18, 1978, Series No. 36, at 1, Organization of American States, Official Record, OEA/Ser. L/V/II.23 Document Revision 2, 1144 U.N.T.S. 123, and the European Convention for the Protection of Human Rights and Fundamental Freedoms, *entered into force* Sept. 3, 1953, 213 U.N.T.S. 222. In both systems, "ensure" has been similarly interpreted to require prevention and punishment of private interference with protected rights. *See, Velasquez Rodriguez Case*, Inter-Am. Ct. H.R. 35, Ser. C, No. 4,OAS/Ser.L/V/III.19, doc. 13 (1988); *X & Y v.The Netherlands*, Series A. No. 91, Application No. 8978/80 Eur. Ct. J. 8 EHRR 235 (1986) (State must afford remedies for private sexual assault of a mentally disabled person.).

[5] In addition, the Human Rights Committee adopted the definition of discrimination found in the Convention on the Elimination of All Forms of Discrimination Against Women, *entered into force* Sept. 3, 1981, 1249 U.N.T.S. 20378 ["hereinafter "Women's Convention at __"], which includes "*any* distinction, exclusion or restriction made on the basis of sex which has the *effect* or purpose of impairing or nullifying the recognition, enjoyment, or exercise by women, on a basis of equality of men and women, of human rights and fundamental freedoms in the political,

The unanimous approval by the U.N. General Assembly of the *Declaration on the Elimination of Violence Against Women*, U.N. GAOR Res. 104, 48th Sess., U.N. Doc. A/Res/48/104 (1994) (hereinafter "*Declaration on Violence* at___") explicitly and unequivocally interprets the ICCPR to require states to guarantee the right to be free from gender-based violence. *See, e.g., Filartiga v. Pena-Irala*, 630 F.2d 876, 879 (2nd Cir. 1980) (relying on the Declaration Against Torture as interpreting the ICCPR).

2. The ICCPR Protects the Right To Be Free From Gender-Based Violence.

Under the Covenant, gender-based violence is an extreme form of gender based discrimination which also violates a broad range of other fundamental rights, largely paralleling Fourteenth Amendment rights, privileges and immunities.

The ICCPR requires a State Party to respect and ensure all rights free from all forms of discrimination, including distinction on the basis of sex, ICCPR at art. 2; to "undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights" protected by the treaty, *id.* at art. 3; and to ensure "[a]ll persons shall be equal before the courts." *Id.* at art. 14. Furthermore, article 26 of the ICCPR guarantees not only equal protection of the laws, but also "equal and effective protection against discrimination." *Id.* at art. 26. [6] ICCPR article 23 provides that State Parties "shall

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economic, social, cultural, civil or any other field." *Id.* at art. 1 (emphasis added).

[6] These articles of the ICCPR provide parallel and intersecting protection for discrimination on the basis of race. In addition, the Convention on the Elimination of All Forms of Race Discrimination, *entered into force Jan. 4, 1969 and ratified by the U.S. on Oct. 21 1994*, 660 U.N.T.S. 195 (1966) [hereinafter "CERD at__"), would provide further constitutional

take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage and its dissolution." *Id.* at art. 23. Finally, non-discrimination based on sex is a non-derogable right under the ICCPR. *Id.* at art. 4(1).

The Covenant also explicitly protects the rights to life, liberty and security of person; the freedom from slavery or servitude in all its forms; torture, and other cruel inhuman or degrading treatment or punishment; the rights to liberty of movement and choice of residence; the rights to freedom of thought, belief, expression, information and association; the right to protection of and equality in family life; and the right to take part in the conduct of public affairs.[7] Separately and together these rights provide broad protection against gender-based violence, including, but not limited to, the type of gender-based violence for which VAWA provides a civil cause of action.

The *Declaration on Violence* interprets the ICCPR by announcing "a clear statement of the rights to be applied to ensure the elimination of violence against women in all its forms." *Declaration on Violence* at Preamble. Significantly, it cites the ICCPR as the source of the State obligation to prohibit gender-based violence and repeats many of the above-listed rights verbatim. *See Declaration on Violence* at art. 3.[8]

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basis for Congressional enactment of VAWA to the extent that racial discrimination affects access to justice in the state courts for victims of gender violence.

[7] *See* ICCPR at art. 6; art. 9; art. 8; art. 7; art. 12, art. 18, art. 23, and art. 25.

[8] Specifically, the rights listed in the *Declaration on Violence* are the right to life, equality, liberty and security of the person, equal protection under the laws, freedom from all forms of discrimination, highest attainable standard of physical and mental health, just and favorable work conditions, and the right to not be subjected to torture, or other cruel,

The U.N. Human Rights Committee, when considering States' reports on compliance,[9] routinely inquires of States Parties about the incidence of and measures taken to address gender-based violence. In its comments on the U.S. report, discussed below, the Human Rights Committee specifically lauded VAWA as an important step to meeting ICCPR obligations. *See infra*, § __ ___. In response to quadrennial State reports over the last two years, the Human Rights Committee has made it clear to dozens of states that providing remedies for gender-based violence is mandated under the Covenant.[10]

Additionally, the Human Rights Committee gives particular weight to the jurisprudence of the U.N. Committee on the Elimination of All Forms of Discrimination Against Women ("CEDAW"),[11] which interprets the Convention on the Elimination of All Forms of Discrimination Against Women, *entered into force* 3 Sept. 1981, 1249 U.N.T.S. 20378 ["hereinafter "Women's Convention at __"].[12] CEDAW issued

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inhuman or degrading treatment or punishment. *See Declaration on Violence* at art. 3.

[9] Pursuant to ICCPR art. 40.

[10] *See, e.g.*, Summary of the Record of the Human Rights Committee,U.N. Doc. CCPR/C/79/Add.95 (1998) (Algeria); U.N. Doc. CCPR/C/79/ Add.99 (1998) (Belgium); U.N. Doc. CCPR/C/79/Add.107 (1999) (Costa Rica); U.N. Doc. CCPR/C/79Add.98 (1998) (Iceland); U.N. Doc. CCPR/C/79/Add.94 (1998) (Italy); U.N. Doc. CCPR/C/79/Add.102 (1998) (Japan); U.N. Doc. CCPR/C/79/Add.109 (1999) (Mexico); U.N. Doc. CCPR/C79/Add.89 (1998) (Zimbabwe).

[11] *Compilation* at Part I, Comment 1.

[12] Under the Convention, CEDAW is charged with reviewing State reports and making "suggestions and general recommendations based on the examination of reports and information received from State parties." Women's Convention at art. 18-21.

a General Recommendation on "Violence Against Women" which both recognizes gender-based violence as an extreme form of discrimination, and affirms that the specific rights contained in the ICCPR are applicable to gender-based violence. *Compilation* at Part IV, Recommendation 19(7).[13] The Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women, [hereinafter "Belem do Para"] adopted by acclamation of the General Assembly of the Organization of American States, also cites these rights.[14] These interpretive developments, as well as other State practice, discussed in Section ___, *infra*, demonstrate the uncontested application of the ICCPR to gender-based violence.

Thus, under the ICCPR, the State failure to protect against gender-based violence violates a broad range of equality rights applicable to both the public and private life. The legislative history of VAWA details the myriad of ways in which such violence operates as a tool of discrimination, as well as how gender-based discrimination obstructs women's access to the state courts. S. REP. NO. 103-138, 42-43(1993) [hereinafter "S.R. at __"]. Likewise, the *Declaration on Violence* and CEDAW Recommendation on violence against women recognizes violence against women as a severe form of discrimination. *Compilation* at Part IV, Recommendation 19.

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[13] General Recommendation 19 finds that the "right to life," the "right not be subject to torture or cruel, inhuman or degrading treatment or punishment," the "right to equal protection," and the "right to liberty and security of person," all protect against gender-based violence. *Compilation* at Part IV, Recommendation 19(7).

[14] Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women, *opened for signature* 9 June 1994, 3 IHRR 232 at ____ [hereinafter "Belem do Para at ___"].

Gender-based violence in intimate relationships, having both the purpose and effect of subordinating the woman, nullifies the right to equality in marriage and domestic partnerships. S.R. at 36-39. Creating a federal cause of action, like VAWA, is an effort both symbolically and practically to repudiate acceptance of and end impunity for gender-based violence, which is indispensable to ensuring the equality of women. S.R. at 36-39.

The right to life, guaranteed by Art. 6 of the ICCPR, is also clearly violated by State failure to protect against gender-based violence. The Human Rights Committee makes it clear that the right to life applies to *de facto* systemic causes of death (and not simply the death penalty), to official as well as private encroachment and requires states to adopt positive measures. *Compilation* at Comment 6. The legislative history of VAWA contains findings that gender-based "violence accounts for a significant number of murders in this country and that one-third of all women who are murdered die at the hands of a husband or boyfriend." S. R. at 42-43, 129[15]

The right to liberty, protected by Article 9, is related to the "the right to liberty of movement and freedom to choose h[er] residence under Article 12[16] as well as a broad range of other

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[15] *See also Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences*, at ¶ 60, 52nd Sess., U.N.GAOR, Hum. Rts. Comm., U.N. Doc. E/CN.4/1996/53 (1996) ("[W]omen victims of domestic violence are being murdered by their batterers with increasing frequency . . .Studies conducted in . . . the United States of America document the reality of femicide committed within the domestic sphere.").

[16] The Human Rights Committee's General Comment 8 on Article 9 makes clear that this right applies not only to official detention, but also to "other cases in which an individual claims to be deprived of h[er] liberty in violation of the Covenant." *Compilation* at Comment 8.

explicit rights. Accordingly, State failure to protect against gender-based violence may violate the right to liberty because it reinforces "a battered woman's fear of precipitating deadly violence against herself or her children [that] may make escape dangerous." *Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences*, at ¶ 46, 52nd Sess. U.N. GAOR, Hum. Rts. Comm., U.N. Doc. E/CN.4/1996/53 (1996). Indeed, the Senate Report specifically found that "[g]ender-based violent crimes and fear of gender-based crimes restrict movement." S.R. at 39. Additionally, gender-based violence -- both intimate violence and that inflicted by acquaintances and strangers in workplaces, schools and the community -- is directed at controlling women's actions and statements. It prevents and inhibits them from traveling, working, and participating in public life, S.R. at 37, 42-43. It also obstructs their ability to obtain information or an education, or to express thoughts or beliefs, all of which are aspects of equality and liberty protected by the Covenant. *Id.* at 43-44.

The right to security of person, also guaranteed by Article 9 of the I, is not limited to formal deprivation of liberty, but protects physical and mental integrity from invasion by both official and private persons. *See* MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 162-166 (1993) [hereinafter "Nowak at __"]. Congress found that at least one million women a year require health care services for injuries and disabilities—some permanent-- caused by intimate partners. This statistic does not include the ongoing devastating effects of trauma. S.R. at 31, 37. Also contrary to the protection of privacy guaranteed by ICCPR

article 17, gender-based violence inflicts severe physical and psychological harm.[17]

The right to be free from torture and cruel, inhuman or degrading treatment, protected by ICCPR article 7, also encompasses gender violence.[18] Again, the Human Rights Committee clearly states that this right requires the State to afford everyone protection against torture and ill treatment, "whether inflicted by people acting in their official capacity, outside their official capacity, or in a private capacity." *Compilation* Part 1, General Comment 20 at ¶ 2. Moreover, is "not sufficient [for the State] to make [torture] a crime." *Id.* at ¶ 8. The Comment notes that the characterization of ill-treatment depends on its "nature, purpose, and severity," *id.* at ¶ 4, that it and may occur in many contexts, including teaching and medical institutions, *id.* at ¶ 5. Rape and other forms of sexual violence by private actors have been treated as

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[17] The Senate Report contains chilling findings on the prevalence of intimate violence, indicating that 3 to 4 million women are abused each year and between 2,000 and 4,000 are killed by their partners. S.R. at 36-37. Absent effective protection, women are denied even the sanctuary of their homes, and are terrorized within their families. *See* 140 Cong. Rec. H4724-02, *H4724 (1994) ("[C]an you imagine living a life where not only was the street unsafe, home was more unsafe than the street? [This is] domestic terrorism.") (statement of Rep. Schroeder).

[18] Ratified by the U.S. on Nov. 20, 1994, the Convention on the Elimination of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides an alternative source of treaty power for the enactment of VAWA, making the U.S. responsible for such private violence under the treaty when it has ordered, instigated, consented or *acquiesced* therein. (emphasis added). *See* Convention on the Elimination of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *entered in force* Nov. 20, 1994 at Art. 1. [herinafter "CAT at ___"] It further obligates states to take "effective, legislative, ...[and] judicial measures to prevent acts of torture..." *id.* art. 2(1), and to ensure civil redress for its victims, *id.* at art. 14(1).

torture in other contexts.[19] Severe unredressed domestic violence may also constitute torture or ill-treatment.[20] Extreme forms of gender violence also amount to privately inflicted servitude or slave-like conditions which violate the ICCPR irrespective of any State involvement.[21]

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[19] Under art. 5(2) of the American Convention on Human Rights, which parallels ICCPR art. 7, torture includes rape by para-militaries and criminal elements allowed to operate with impunity. *See Report on the Situation of Human Rights in Haiti*, Inter-Am. C.H.R., OEA/Ser.L/V/11.88, Doc. 10 rev. (1995) at §§ 128-133 [hereinafter "Haiti Report at __"]; *see also Aydin v. Turkey*, Eur. Ct. H.R., 25/09/1997 (treating rape as torture under the European Convention). The United Nations Special Rapporteur on Systematic Rape, Sexual Slavery, and Slavery-Like Practices During Armed Conflicts, has also made explicit findings regarding rape as a form of torture. *See Report of the Special Rapporteur on Systematic Rape, Sexual Slavery, and Slavery-Like Practices During Armed Conflicts*, at ¶ 53-55, 50th sess., U.N. GAOR, Human Rts. Comm., U.N. Doc. E/CN.4/1996/53 (1996). Likewise, in the *ad hoc* International Criminal Tribunals, rape has been held or identified as a from of torture in judgements. *See Prosecutor v. Furndzija*, Case No. IT-95-17/1-T (Judgment Dec. 10, 1998)' *Prosecutor v. Celebici*, Case No. IT-96-21-T (Judgement Nov. 16, 1998); *and Prosecutor v. Akayesu*, Case No. ICTR-96-4-T (Judgment Sept. 2, 1998).

[20] "[D]epending on its severity and the circumstances giving rise to State responsibility, domestic violence can constitute torture or cruel, inhuman and degrading treatment or punishment under the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment." Special Rapporteur at ¶ 42. Both "the battered woman and the prisoner live isolated under a reign of terror and impairment as well as often profound and lasting psychological debilitation." *Id.* at ¶ 46. "[T]he lack of resources, legal and community support and alternative means to survive may make escape seem impossible as well as reinforce her shame, hopelessness, and sense that she deserves this treatment." *Id.* at ¶ 44.

[21] Gender violence may also be examined under the Thirteenth Amendment. It is sometimes severe enough to constitute a form of involuntary servitude in itself. But beyond that, the continued occurrence of gender violence together with the discriminatory treatment by the courts of the women who are its victims constitutes a badge and incidence of slavery. *See generally*, Michellene Elizabeth Hearn, *A Thirteenth Amendment Defense of the Violence Against Women Act*, 146 U. PENN.

C. The ICCPR Calls For Judicial Remedies, Such As VAWA, To Redress Gender-Based Violence.

Article 2 of the ICCPR requires States to "adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant." *Id.* at art. 2. It calls upon each State Party to ensure to any person whose rights have been violated, whether by state officials or private persons, "an effective remedy," to be "determined by competent judicial, administrative or legislative authorities or other competent authority." ICCPR at art. 2(3)(a) and 2(3)(b).

Indeed, the Covenant envisions a VAWA-type cause of action, calling upon states "to develop the possibilities of judicial remedy." ICCPR at art. 3. The *Declaration on Violence* affirms this, endorsing "civil . . . domestic legislation... to punish and redress the wrongs caused to women who are subjected to violence." *Declaration on Violence* at art. 4(d). The CEDAW Recommendation on violence against women likewise emphasizes "civil remedies and compensatory provisions." *Compilation* at Part IV, Recommendation 19.

D. The Executive's Identification of VAWA As Responsive to U.S. Obligations Under The ICCPR Should Be Given Great Weight.

L.REV., 1097 (1988) *and* Joyce McConnell, *Beyond Metaphor: Battered Women, Involuntary Servitude and the Thirteenth Amendment*, 4 YALE J. L. & FEMINISM 207 (1992); *see also Jones v. Mayer*, 392 U.S. 409 (1968). Prior to the 19th century, women had a chattel- or slave-like status under the common law and their husbands had the power to control them; central to this power was "the right to use violence with a stick no greater than the thumb." *See, e.g. State v. Rhodes*, 61 N.C. 453 (Phil. Law 1868). This Court has also implicitly suggested that current legal manifestations of women's traditional common-law status implicate Thirteenth Amendment rights. *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833, 897-898 (1992).

Given the Executive Branch's special constitutional role in negotiating and enforcing treaties, the Court gives Executive interpretations of ratified treaties great weight. *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184-185 (1982) ("Although not conclusive, the meaning attributed to treaty provisions by the government agencies charged with their negotiation and enforcement is entitled to great weight."); *see also, Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961).

Here, the Executive Branch has taken the official position that the ICCPR obligates States parties to provide remedies for gender-based violence and that VAWA is implementing legislation to meet U.S. obligations. In connection with the first U.S. Report to the Human Rights Committee on U.S. compliance with the treaty, the Executive emphasized VAWA as a measure undertaken to comply with ICCPR obligations.[22] The Justice Department spokesperson described the Act as "the most comprehensive federal effort in its field," and noted especially the civil cause of action for gender-based violence.[23]

The Executive also affirmed its commitment to comply with the ICCPR and "extend [the Covenant] to all parts of the federal states without limitations or exceptions" in its Report to the Human Rights Committee, regarding implementation of the ICCPR through Article 50. Concluding Observations of the Human Rights Committee: United States of America, at ¶ 277, CCPR/C/79/Add.50 (3/10/95) [hereinafter "Concluding Observations at ¶ ___"]. The U.S. spokesperson stated that while federalism concerns would not permit the federal

[22] Summary Record of the 1401st Meeting: United States of America, at ¶ 29, CCPR/C/SR.140 (17/04/95).

[23] *Id.*

government to obligate the states to undertake particular actions -- such as "dictating the basic form or internal workings of state government" -- federal responsibility did extend to "enforc[ing] uniform standards for the respect of civil and political rights". [24] Accordingly, VAWA does not mandate state action, but rather, as noted by U.S. officials, works in partnership with states and complements state jurisdiction. [25] In turn, the Committee's concluding comments "note[] with satisfaction the assurances of the [U.S.] Government that its declaration regarding the federal system is not a reservation and is not intended to affect the international obligations of the United States." Concluding Observations at ¶ 277.

Because the Executive Branch's interpretation of the treaty was part of the official reporting process, it also constitutes State practice and conduct and is thus further evidence of the treaty's meaning. *O'Connor v. U.S.*, 479 U.S. 27, 33 (1986) ("The course of conduct of parties to an international agreement, like the course of conduct of parties to any contract, is evidence of its meaning."); *see also*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES at § 325 (2) (1986). ("[S]ubsequent practice between the parties in the application of the agreement, [is] to be taken into account in its interpretation.").

[24] Summary Record of the 1405th Meeting: United States of America at ¶ 10 CCPR/C/SR.1405 (24/04/95).

[25] *See, e.g.*, White House, Office of the Vice President, *Vice President Gore Announces $223 Million in Grants to Help Detect and Stop Violence Against Women* (visited Nov. 9, 1999) <<http:///www.pub.whitehouse.gov/uri.res/I2R?urn:pdi://oma.eop.gov.us/1999/3/2/4.text.1>; U.S. Dep't of Justice, *Excerpts From Attorney General Janet Reno's Testimony Before the Senate Judiciary Committee May 15, 1996* (visited Nov. 9, 1999) <<http://www.doj.gov/vawo/ag796.htm>>.

II. CONGRESS HAS CONSTITUTIONAL AUTHORITY TO ENACT VAWA TO IMPLEMENT INTERNATIONAL CUSTOMARY LAW OBLIGATIONS.

A. The Define and Punish Clause of the U.S. Constitution Authorizes Congress To Enact Legislation to Fulfill Customary Law Obligations.

Art. 1, Section 8, clause 10 of the Constitution grants Congress the power to "define and punish Piracies and Felonies committed on the high Seas and Offenses against the Law of Nations." This Court stated: "The national government is in this way made responsible to foreign nations for all violations by the United States of their international obligations, and because of this Congress is explicitly authorized 'to define and punish ...' offenses against the law of nations." *U.S. v. Arjona*, 120 U.S. 479, 483 (1887).[26] This clause "authorize[s] Congress to derive from the often broadly phrased principles of international law a more precise code as it determines that to be necessary to bring the United States into compliance with rules governing the international community." *Finzer v. Barry*, 798 F.2d 1450, 1455 (D.C. Cir. 1986), *rev'd on other grounds*, *Boos v. Barry*, 485 U.S. 312 (1988).

The concept of "Offenses Against the Law of Nations" embraces customary international law and includes civil as well as criminal remedies. This Court took note of Congress's citation to the Define and Punish Clause, *inter alia*, as authority for its enactment of the Foreign Sovereign

[26] *Arjona* also stated Congress did not have to identify the Define and Punish Clause so long as Congress defined the offense and the U.S. had an international legal obligation to prevent it. *Arjona*, 120 U.S. at 483.

Immunities Act (FSIA) regulating federal court actions cognizable under Article III, sec. 2, cl. 1. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493 (1983). *See* H.R. Rep. No. 1487, 94th Cong., 2d Sess. (1976). In passing the Torture Victim Protection Act (TVPA), Congress again explicitly cited to the Define and Punish Clause as authority to create a civil cause of action for torture and extrajudicial execution. *See* S. REP. No. 102-249 (1992).

Additionally, as the Second Circuit recognized in its landmark decision in *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (1980), when Congress provides only a civil remedy for an offense against human rights, the conduct complained of still retains " its character as an international law violation." *See also*, *Trible v. Stone*, 187 F.Supp 483, 485 (D.D.C. 1960) (Basic human rights do not depend on nomenclature.").

Congressional power under the Define and Punish Clause clearly authorizes sanctions on private conduct that the United States is required to prevent under international law. For example, in *Arjona*, the Court found that although the international counterfeiting prohibition applied only to States, the Define and Punish Clause provided adequate constitutional authority for the criminal statute [punishing private counterfeiting] because the United States had the "obligation ... to punish those who, within its own jurisdiction, counterfeit the money of another nation." *Arjona*, 120 U.S. at 484.[27] Similarly, courts have consistently upheld federal prohibitions on private protests or harassment of foreign embassies or

[27] "The law of nations requires every national government to use 'due diligence' to prevent a wrong being done within its own dominion to another nation . . . ." *Arjona*, 120 U.S. at 484.

diplomats under the Define and Punish Clause[28] even though the protestor or individual harassing foreign diplomats is not the direct "violator" of the law of nations. *Frend v. United States,* 100 F.2d 691, 693 (D.C. Cir. 1938), *cert. denied,* 306 U.S. 640 (1939).

Thus, VAWA is a proper exercise of Congressional authority under the Define and Punish Clause. It creates a civil remedy to redress conduct customary international law condemns as criminal and which states are required to sanction. *See* § III below. As with counterfeiting foreign currency and harassment of diplomats and foreign missions, "nations have made it their business, both through international accords and unilateral action, to be concerned with domestic human rights violations..." *Filartiga,* 630 F.2d at 889. This principle applies to gender-based violence.

B. The Necessary and Proper Clause Authorizes Congress To Confer Article III Jurisdiction On The Federal Courts To Implement Customary Norms.

Since VAWA provides a federal judicial remedy for violation of the customary norm condemning gender-based violence, *see infra* § III, it is an appropriate exercise of Congress's power under the Necessary and Proper Clause to "carry...into

[28] *Boos v. Barry*, 485 U.S. 312, 323 (1988) ("The constitution itself attempts to further this interest [of the United States to comply with international law] by expressly authorizing Congress 'to define . . . punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations'...Moreover, protecting foreign emissaries has a long history and noble purpose."); *Finzer v. Barry*, 798 F.2d 1450, *rev'd on other grounds*, *Boos v. Barry*, 485 U.S. 312 (1988); *Jewish Defense League Inc. v. Washington,* 347 F. Supp. 1300 (D.D.C. 1972); *Frend v. United States,* 100 F.2d 691 (D.C. Cir. 1938), *cert. denied,* 306 U.S. 640 (1939).

Execution...all other Powers vested by [the] Constitution in the Government of the United States."[29] U.S. Const. art. I, § 8, cl. 18. Art. III, Section 2, clause 4 of the Constitution vests federal courts with jurisdiction over cases "arising under the laws of the United States," which includes customary international law.

Throughout the last two centuries the Court has consistently affirmed the principle that customary international law is part of the "laws" of the United States as understood by Article III, section 2, clause 1. In *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 474 (1793), although dealing with the expediency of states to ascertain international law, the Court stated that the U.S. was responsible to other countries for the "conduct of each State, relative to the laws of nations, and the performance of treaties." Reinforcing the obligation is *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 281 (1796), stating "[w]hen the United States declared their independence, they were bound to receive the law of nations..." The Court explicitly affirmed the status of customary international law in *The Nereide*, 9 U.S. (9 Cranch) 388, 423 (1815), saying, "[T]he Court is bound by the law of nations which is a part of the law of the land." Moreover, in *The Paquete Habana*, 175 U.S. 677, 700-701 (1900) this principle was further elucidated: "[i]nternational law [which includes customary law] is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction...".[30]

[29] This power is a flexible grant to Congress to perform its duties under the laws of the nation. *McCulloch v. Maryland,* 17 U.S. 316, 324 (1819) ("[T]he grant of powers itself necessarily implies the grant of all usual and suitable means for the execution of the powers granted."). *See also Graham v. Deere,* 383 U.S. 1, 6 (1966); *Yakus v. United States,* 321 U.S. 414, 425 (1944).

[30] *See Filartiga,* 630 F.2d at 885 ("the law of nations . . . has always been a part of federal common law") *and Xuncax v. Gramajo,* 886 F.

In cases involving the Alien Tort Claims Act lower courts have consistently found that Congress may appropriately provide jurisdiction to the federal courts for the enforcement of customary law. [31] VAWA, like ACTA, defines a specific remedy for already recognized rights under human rights law and thus is not "granting new rights ... but simply opening the federal courts for adjudication of the rights already recognized by international law." *Filartiga,* 630 F.2d at 887.

III. Ensuring The Right To Be Free From Gender Based Violence Is An Obligation Under International Customary Law.

A. U.S. Courts Have Consistently Recognized The Appropriate Sources For Discerning Customary Law.

From its earliest jurisprudence, this Court has articulated widely accepted international principles for the discernment of customary international law. *The Paquete Habana*, 175 U.S. at 700.[32] More recently, courts have relied on article 38 of the

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Supp. 162, 179 (D. Mass. 1995). *See also, Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 421-24 (1964); *Blackmer v. United States,* 284 U.S. 421, 437 (1932); *United States v. Arjona,* 120 U.S. 479, 484-85 (1887); *Kadic v. Karadzic* ,70 F.3d 232 (2nd Cir. 1995), *cert. denied, Karadzic v. Kadic,* 518 U.S. 1005 (1996); *Garcia-Mir v. Meese,* 788 F.2d 1446, 1453 (11th Cir. 1986); *Forti v. Suarez-Mason,* 672 F. Supp. 1531, 1542 (N.D. Cal. 1987); J. Paust, *Private Duties* at 34-48.

[31] *See Filartiga* 630 F.2d at 887; *see also, Gramajo,* 886 F.Supp. at 179 (ACTA "grants both federal private cause of action as well as a federal forum in which to assert the claim.).

[32] This Court has also instructed that "where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted

Statute of the International Court of Justice.[33] *See, e.g. Filartiga*, 630 F.2d at 881.

One of the most comprehensive statements on sources of customary human rights law is now found in the Restatement of the Law (Third), Foreign Relations Law of the United States (1986). Significantly, the Restatement notes: "the practice of states that is accepted as building customary international law of human rights includes some forms of conduct different from those that build customary international law generally." *Id.* at § 701. The Restatement sets out the following categories of sources:

> [1] [V]irtually universal participation of states in the preparation and adoption of international agreements recognizing human rights principles generally, or particular rights;
>
> [2] the adoption of human rights principles by states and in regional organizations in Europe, Latin America, and Africa;
>
> [3] general support by states for United Nations resolutions declaring, recognizing, invoking, and applying international human rights principles as international law;

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with the subjects of which they treat." *The Paquete Habana*, 175 U.S.at 700.

[33] Article 38 provides that:
The Court, whose function is to decide in accordance to international law ...shall apply: (a) international conventions...establishing rules expressly recognized by the contesting States; (b) international custom, as evidence of a general practice accepted by law; (c) the general principles of law recognized by civilized nations; and (d)... judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law.

[4] action by States to conform their national law or practice to standards or principles declared by international bodies... [and]

[5] invocation of human rights principles in national policy, in diplomatic practice, in international organization activities and actions, and other diplomatic communications. . . *Id.* at Reporter's Notes ¶ 2.

These sources consistently reaffirm the customary norm prohibiting gender-based violence and the State obligation to provide civil remedies for such violations.

B. Gender-Based Violence Violates A Customary Norm of International Law.

Widely ratified treaties, together with unchallenged interpretive declarations and statements thereto, are a powerful source of customary international law. *Id.* The widespread ratification of the ICCPR and CAT, discussed in Section I,[34] *supra*, constitutes compelling evidence of a customary norm guaranteeing against all forms of gender-based violence and imposing responsibility on States to redress it through VAWA-type remedies.[35] Beyond the treaties ratified

[34] For example, 144 States have ratified the ICCPR, and 118 States have ratified the CAT -- which impose obligations on states to enact remedies for gender-based violence. *See supra* § I.

[35] This Court found in *Filartiga*, that the ICCPR, at that time not yet ratified by the United States, constituted evidence of the human rights prohibition on torture. 630 F.2d at 884. Thus, the ICCPR, the CAT, and the Women's Convention -- as interpreted by CEDAW's General Recommendation no. 19 and the *Declaration on Violence* -- are evidence of a customary norm prohibiting all forms of gender-based violence and imposing obligations on States to take action to eliminate it. *See supra* § IA; *see also*, J. Paust, *Private Duties* at 22-23, 369.

by the U.S., the near unanimous ratification of the Women's Convention underscores this customary norm, as do regional treaties and resolutions. [36] For example, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women also declares the right to live free from gender-based violence, *see* Belem do Para at art. 3 and 6, and requires states to provide civil remedies. *Id.* at art. 7(d). The Declaration on the Elimination of Violence Against Women -- adopted unanimously by all the member States of the General Assembly of the United Nations –contributes to customary law both as an interpretation of the ICCPR, CAT and CEDAW and as evidence of state practice reflecting the "general assent of nations." *See Filartiga*, 630 F.2d at 884.

Further evidence of the "general assent of nations" is found in the continuing attention to gender violence in the U.N. human rights system. In l994, the U.N. Human Rights Commission (hereinafter "Commission"), recognizing the need to eliminate gender violence as a priority concern, created the position of U.N. Special Rapporteur on Violence Against Women, Its Causes and Consequences. Every year since, the Commission has adopted resolutions endorsing her reports and emphasizing states' obligations to eliminate violence against women.[37] *See,*

[36] The Women's Convention has been ratified by 165 States.

[37] This "general assent" is also found in the consensus documents negotiated by virtually all member states at the recent series of United Nations World Conferences, which condemn gender violence and call for remedies without reservation. *See, e.g. Vienna Declaration and Programme of Action*, General Assembly, World Conference on Human Rights, U.N. Doc. A/Conf./57/23 (12 July 1993). *and Beijing Declaration and Platform for Action*, General Assembly Report of the Fourth World Conference on Women, U.N. Doc. HRV/GEN/1/Rev.2 (29 March 1996). In doing so, these conference agreements not only represent a programmatic consensus to take action, such as VAWA, to redress, prevent and eradicate the social problem of gender-based violence; they also recognize an international human rights obligation to do so.

e.g., U.N. GAOR, Hum. Rts. Comm., 55th meeting, U.N. Doc.E/CN.4/RES/1999/42 (1999), U.N. GAOR, Hum. Rts. Comm., 52nd meeting, U.N. Doc. E/CN.4/RES/1998/52, (1998); U.N. GAOR, Hum. Rts. Comm., 57th meeting. U.N. Doc. E/CN.4/RES/1997/44 (1997).

Moreover, States around the globe have taken action to create legal mechanisms to address gender-based violence. "In most countries, . . . there exists at least one of three traditional legal mechanisms available to victims of domestic violence: criminal law, civil remedies, or matrimonial relief." U.N. GAOR, Human Rts. Comm., *Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences*, 52nd sess., U.N. Doc. E/CN.4/1996/53 (1996) at ¶ 121.

Finally, the participation of the scholars and human rights experts as *amici curiae* in this brief, and their substantial work, *see supra* "Interests of the *Amici*," attest to the widespread recognition that gender violence constitutes one of the gravest, albeit long-ignored and still pervasive, violations of human rights and humanitarian law. [38]

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[38] Selected additional scholarship includes the following: Hilary Charlesworth, *The UN Declaration on Violence Against Women*, AM. SOC. OF INT'L L. INSIGHT (1994); Hilary Charlesworth & Christine Chinkin, *The Gender of Jus Cogens*, 15 HUM. RTS. Q. 61 (1993); Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 COLUM. HUM. RTS. L. REV. 291 (1997); Katherine M. Culliton, *Finding a Mechanism to Enforce Women's Right to State Protection from Domestic Violence in the Americas*, 34 HARV. INT'L L. J. 507 (1993); Dorothy O. Thomas and Mishele E. Beasley, *Domestic Violence as a Human Rights Issue*, 15 HUM. RTS. Q. 36 (1993); Theodor Meron, *Rape as a Crime Under International Humanitarian Law*, 87 A.J.I.L. 424 (1993); Celina Romany, *State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law, in* REBECCA J. COOK, ED., HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 85-115 (1994); *and* Katherine Adrienne Wing, *A Critical Race Feminist*

C. The Executive's Recognition Of Its Human Rights Obligation To Redress Gender-Based Violence Through VAWA Is Entitled To Deference.

The United States has played a leadership role in negotiating and reaffirming diplomatically the international recognition of gender violence as a violation of human rights as well as the need for states to provide remedies therefor. For example, the official United States spokeswoman on issues of gender violence at the Fourth World Conference on Women in Beijing stated:

> [D]omestic and sexual violence represent a major obstacle for women and contributes to the low social and economic status of women. When women are prevented by violence from participating fully within our families, our society, our economy, and our political structures, it will now be recognized as *violation of our human rights and fundamental freedoms.* [39]

She further identified VAWA as the primary example of a United States initiative addressing human rights violations

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Conceptualization of Violence: South African and Palestinian Women, 60 ALB. L. REV. 943 (1997).

[39] On the Record Briefing by Director Bonnie J. Campbell, Violence Against Women Office, Department of Justice. Sept. 12, 1995. (emphasis added). Ms. Campbell made clear the administration's position that violence against women violates a number of fundamental human rights, including the right to be free from torture ("rape is a form of torture . .and a violation of human rights"), and the right to be free from gender discrimination ("the provision for 'equal sexual relations' is a vital element of our ability to deal with rape and sexual assault."). *Id.*

involving violence against women, noting specifically the federal civil rights remedy at issue here. *Id.*

IV. BOTH TREATY AND CUSTOMARY LAW SUPPORT INTERPRETING THE COMMERCE CLAUSE AND THE FOURTEENTH AMENDMENT AS CONFERRING AUTHORITY ON CONGRESS TO PROVIDE REDRESS FOR GENDER-BASED VIOLENCE.

Where, as in the instant case, there is no inevitable conflict with the Constitution, the obligation of the U.S. to respect and fulfill its international obligations should dispose the judiciary to read the Constitution to reconcile the two. As this Court has found, "[a]ny rule of constitutional law that would inhibit the flexibility of the political branches of government to respond to changing world conditions should be adopted only with the greatest caution." *Mathews v. Diaz,* 426 U.S. 67, 81 (1976). This is particularly true where, as here, the capacity to honor significant foreign policy and international commitments-- a priority concern since the founding of the Republic-- is at stake. *Missouri v. Holland*, 252 U.S. at 432.

For these reasons, "Courts in the United States have increasingly looked to international human rights standards as law in the United States or as a guide to United States law." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 701, Reporter's Note at. ¶ 7 (1987). The reasoning underlying the principle stated by this Court in *The Charming Betsy*, 6 U.S. (2 Cranch) U.S. 64, 118 (1804) that "an act of Congress ought never be construed to violate the law of nations, if any other possible construction remains," also supports constitutional interpretations that are consistent

with international law and allow Congress to meet international obligations. [40]

The principle favoring reconciliation applies with special force where constitutional history and precedents, including divided judicial opinions, provide support for constitutional interpretation that is consistent with international law. Without repeating the arguments of the appellants or other *amicus curiae* briefs, *amici* here note that appellees' argument that the Commerce Clause does not authorize the VAWA legislation would entail a marked departure from long-settled interpretations of the scope of the commerce power. Here, Congress and the Executive have recognized that gender violence significantly affects women's ability to participate in and contribute to the economic life of this nation as well as entails significant costs which affect interstate commerce. *See* Pet'r Brzonkala's Br. at § I. Under these circumstances, it is impermissible to read the Commerce Clause to invalidate an Act of Congress that advances our treaty and customary international commitments and is otherwise consistent with the Constitution, including the Tenth Amendment.

The same interpretive principle calls for reaffirming Congressional power under Section 5 of the Fourteenth Amendment to enact the VAWA cause of action. As the explicit constitutional vehicle through which Congress enforces the "privileges and immunities of citizens" as well as the rights to "equal protection" and "due process," Section 5 is a particularly appropriate source of power to implement the

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[40] *See also, Lauritzen v. Larsen,* 345 U.S. 571, 578 (1953); *Garcia-Mir v. Meese,* 788 F.2d 1446, 1453 (11th Cir. 1986) ("To the extent possible, courts must construe American law so as to avoid violating principles of public international law.").

parallel international rights that comprise the human right to be free from gender violence.

Given the Congressional findings of discrimination in state courts for victims of gender violence, *see* Pet'r Brzonkala's Br. at § II, and settled Fourteenth Amendment jurisprudence protecting against such discriminatory access, Section 5 provides ample support for congressional authority to enact the VAWA cause of action. Further, given the US' international treaty and customary obligations to the community of nations, and to its people, to ensure redress for gender-based violences throughout the land, there can be no doubt as to the constitutionality of the federal civil rights remedy that VAWA creates.

WHEREFORE, the judgment of the Court below should be reversed.

Respectfully submitted,

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Nos. 99-5; 99-29

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

-and-

CHRISTY BRZONKALA,

Petitioner,

v.

ANTONIO J. MORRISON, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION BY ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS AND BRIEF *AMICUS CURIAE*

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MOTION FOR LEAVE TO FILE
BRIEF *AMICUS CURIAE*

The Association of the Bar of the City of New York (the "Association") respectfully moves for leave to file a brief annexed hereto as *amicus curiae*. Petitioners have consented to the filing of this brief but one of the Respondents has denied consent.

The Association of the Bar of the City of New York is a professional association of approximately 21,000 attorneys. While the majority of its members practice in New York City, the Association has members in nearly every state and in over fifty countries. The Association is chartered to study, address and promote the rule of law and, where appropriate, the reform of the law. The Association, by its Committee on Federal Legislation, has followed with interest the recent development of restrictions on Congressional power to enact legislation it believes is in the national interest and has issued a report to be published in the November-December, 1999 issue of its publication, *The Record*, dealing with "The New Federalism." The Association's Committee on Civil Rights has been vigilant in pursuing legislative efforts to protect the civil rights of all Americans, particularly those groups whose legal rights have historically been subject to private abuse and legal discrimination. The Association's Committee on Sex and Law is dedicated to eradicating all forms of gender discrimination, and has been a strong advocate for measures which target barriers to women's full participation in civic life. All three Committees have joined together to prepare and submit this brief expressing the point of view of the Association.

It respectfully requested that this Court grant leave to the Association as *amicus curiae* to submit this brief to present its position that this Court should uphold Congressional power to pass legislation in the national interest to protect the civil rights of women against private acts of violence, especially in light of Congressional findings that state enforcement of laws against such acts of violence is inadequate and that such acts substantially affect interstate commerce.

Respectfully submitted:

Dated: New York, N.Y.
November 10, 1999

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BRIEF OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICUS[1]

The statement of the interest of *amicus* is set forth in the accompanying motion for leave to file this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Association believes that the decision of the *en banc* court below is patently incorrect. It presents an anachronistic view of Congress' legislative power under the Commerce Clause, based on an erroneous interpretation of this Court's decision in *United States v. Lopez*, 514 U.S. 549 (1995), which struck down the Gun-Free School Zones Act ("GFSZA"), 18 U.S.C. §922(q)(1)(A). It has long been established that Congress, which represents the broadest expression of the People's will, must be given substantial leeway to solve problems on a national basis. This Court first upheld this broad view of Congressional power in Chief Justice Marshall's decision for the Court 180 years ago in *McCulloch v. Maryland*, 4 Wheat. 316 (1819).

In this century, Congress has increasingly used its legislative power to deal not only with purely economic problems which must be resolved on a national basis, but also with the persistent problems of public and private discrimination. The series of civil rights laws passed from

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[1] Pursuant to Rule 37.6, this brief was authored, prepared and paid for in its entirety by the Association of the Bar of the City of New York.

1964 to the present are among the most significant and important legislative acts of this century, reaffirming the *nation's* promise to ensure -- where the exercise of state police power has proven inadequate – that all persons must be treated equally, regardless of their race, color or gender, and must not be subject to private mistreatment or abuse.

The decision of the Fourth Circuit represents a constricted view of national power that has been repeatedly rejected by this Court in upholding Congress' exercise of its powers with respect to both purely economic matters and civil rights. Its analysis of the Commerce Clause should not be accepted and endorsed by this Court. The civil remedy provisions of the Violence Against Women Act ("VAWA") were properly enacted pursuant to a valid constitutional source of Congressional power. Based on a legislative record compiled over a four-year period, Congress concluded that violence against women is an economic and social problem of the first magnitude that is national in scope and that required a civil remedy on behalf of female victims. Congress specifically found that such violence has a major impact on the national economy: "[g]ender based violence bars its most likely targets -- women -- from full [participation] in the national economy." S. Rep. 103-138 (1993) at 54. Congress concluded that women who are raped or beaten by strangers or battered and abused by their domestic partners are impeded from going to work and do not earn to their full potential. Congress estimated that domestic violence costs employers $3 to $5 billion in absenteeism. In addition, it results in $5 to $10 billion in annual expenditures to repair the effects of gender-based violence -- through health care, diversion programs, and other social costs. See S. Rep. No. 101-545 at 33 (1990). *See also* S. Hrg. 102-369, 102d Cong., 1st

Sess.; Hearing before the Senate Committee on the Judiciary, *Violence Against Women: Victims of the System* (April 9, 1991).

Based on this record, Congress validly concluded that the effect on interstate commerce was significant enough to require civil remedies in addition to those already existing on the state level, particularly since the states are not adequately responding to the problem and, indeed, encouraged the federal government to act.

The decision of the court below was based on an erroneous reading of this Court's decision in *United States v. Lopez*, 514 U.S. 549 (1995). In *Lopez,* this Court noted that Congress can regulate an activity under the Commerce Clause if any one of the following three conditions are met: (1) channels of interstate commerce are involved; or (2) Congress is dealing with the "instrumentalities of interstate commerce" or "persons or things in interstate commerce"; or (3) Congress is regulating those "*activities [that have] a substantial relation to interstate commerce.*" 514 U.S. at 558-59. (emphasis added).

The court below added a gloss to the *Lopez* decision that simply cannot be found in the holding of that case and is not supported by other decisions of this Court. The Fourth Circuit held that if intrastate activity is being regulated by Congress, the conduct itself must be *economic* in nature, no matter how substantial the conduct's effect on interstate commerce. That is, even if a non-economic activity substantially affects interstate commerce, it is beyond Congress' reach. Thus the Fourth Circuit stated: "[The Court] had never extended the substantially affects test to uphold the regulation of a non-economic activity in the absence of a jurisdictional

element," 169 F.3d at 831. As shown below, this Court's upholding of the Public Accommodations provisions of the 1964 Civil Rights Act in *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) and *Katzenbach v. McClung*, 379 U.S. 294 (1964), as well as this Court's upholding of the law criminalizing extortionate credit transactions in *Perez v. United States*, 402 U.S. 146 (1971), shows that the analysis offered by the Fourth Circuit is demonstrably wrong.

Indeed, the analysis of the court below threatens to undermine one of the most important legal developments of this century: the national commitment to civil rights protection exemplified by the 1964 Civil Rights Act. While the Fourth Circuit gave only a passing reference to *Heart of Atlanta* and *Katzenbach v. McClung,* the same analysis that those decisions applied to sustain the validity of the 1964 Civil Rights laws is applicable here and shows that the VAWA is constitutional.

In enacting the civil remedy provisions of the VAWA, as in enacting the 1964 Civil Rights Act, Congress acted in accordance with the national interest and a national consensus pursuant to a valid grant of power under the Commerce Clause of the Constitution.

ARGUMENT

POINT I

CONGRESS VALIDLY ENACTED THE VAWA PURSUANT TO ITS POWER UNDER THE COMMERCE CLAUSE.

We note at the outset that the question of whether Congress, the representative of the national will in its legislative capacity, has the power to act on behalf of the people in passing a specific law reflects on certain first principles in our Constitutional scheme. This case does not deal with the question of whether a Congressional enactment conflicts with a specific constitutional provision, such as the First Amendment. Nor does it deal with Congress' power to restrict or impinge directly upon the power of the States, who are protected by the Tenth and Eleventh Amendments. *See College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 119 S.Ct. 2219 (1999); *Alden v. Maine*, 119 S.Ct. 2240 (1999). Nor does it deal with any separation of powers problems, such as Congress invading the prerogative of the Executive or the Courts. *See Clinton v. City of New York*, 118 S.Ct. 2091 (1998).

We are dealing solely with the pure issue of the source of Congressional power, that is, whether the Constitution provides a basis for Congressional action, given the specific and limited grants in Article I, Section 8, as augmented by the Necessary and Proper Clause?

The decision of the Fourth Circuit is anti-majoritarian in the extreme. The decision below makes it considerably more difficult for the national Congress – surely expressing the desires and wishes of "We the

People" – to address problems of national dimension on a national basis. The approach of the court below is similar to that expressed by the Anti-Federalists before and after the ratification of the Constitution, who viewed any grant of power to a national government as a potential threat to liberty. These concerns had some force at the time of the founding of the republic, when a strong central government was thought capable of using its standing army to overthrow the power of individual states and impose tyrannical rule over its citizens. See Akhil Amar "The Bill of Rights as a Constitution," 100 *Yale L. J.* 1131, 1162-65 (1991). But any resurrection of these concerns now is anachronistic at best.

We believe that there is no proper basis to impose dramatic new restrictions on Congress' power to legislate in the national interest. Congress, which represents the concerns of the entire nation, must be permitted to legislate in areas where it believes States have failed sufficiently to act, so long as there is a proper record of the basis for its action, and the Constitutional grant of power is shown.

How far Congress can legislate in the national interest has been debated in almost every decade of the nation's history. For example, almost immediately after the nation was founded, the Federalists and Jeffersonians confronted the issue of whether Congress had the power to charter the Bank of the United States in the 1790's. During the Monroe Presidency, the question arose whether Congress could provide for "internal improvements." Before the Civil War, the question of Congressional power arose in many forms, particularly over the "nullification" debate in the 1830's. See Gerald Gunther and Kathleen Sullivan, *Constitutional Law* 101, 103, 104 (13th Ed. 1997).

Disputes arose over Congress' power to engage in economic regulation during the Progressive Era in the 1890's and 1900's and over New Deal efforts to deal with the depression in the 1930's. In all of these instances, it was ultimately determined that the national government must be afforded the power to resolve national problems on a nationwide basis. See generally *Lopez*, 514 U.S. at 572-574 (Kennedy, J. concurring).

This Court has responded to and rejected challenges that sought to restrict unduly Congressional authority to act in a series of landmark decisions, such as *McCulloch v. Maryland*, 4 Wheat. 316 (1819) and *Gibbons v. Ogden*, 9 Wheat. 1 (1824), in each of which this Court upheld the exercise of national power. Chief Justice Marshall wrote in *McCulloch*: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adopted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." 4 Wheat. at 421. He also wrote in *Gibbons* concerning the extent of Congressional power under the Commerce Clause: "It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitation other than are prescribed in the Constitution." 9 Wheat. at 196.

After the Civil War and into this century, this Court has continued to uphold Congress' power to "prescribe the rule by which commerce is to be governed." The Court ultimately rejected efforts to derail important New Deal legislation on the grounds that Congress exceeded its power under the Commerce

Clause, *see Wickard v. Filburn*, 317 U.S. 111 (1942); *NLRB v. Jones & Laughlin Steel*, 301 U.S. 1 (1937); *see also United States v. Darby*, 312 U.S. 100, 118 (1941), where this Court upheld the Fair Labor Standards Act, stating:

> The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.

Furthermore, as described in greater detail in the next section, Congress utilized its power under the Commerce Clause to pass significant legislation protecting and expanding civil rights, an exercise of power which this Court upheld in *Heart of Atlanta* and *Katzenbach v. McClung*.

It is simply not true, as the Fourth Circuit asserted, that Congress must avoid legislating in areas to "'which the States lay claim by right of history and expertise,'" [citing *Lopez*, 514 U.S. at 583 (Kennedy, J. concurring);] such as family law, domestic relations or violent crime, "conduct that has been traditionally regulated by the States through their criminal codes" against classically criminal conduct, 169 F.3d at 840. Thus Congress has often legislated in the area of family law, passing laws concerning deadbeat fathers, (18 U.S.C. §228), prohibiting parental kidnapping, (18 U.S.C. §1073) and prohibiting sexual exploitation of children (18 U.S.C. §2251 *et seq.*).

In addition, Congress has passed numerous laws based solely on an "affecting commerce" rationale, such as laws prohibiting extortionate credit transactions (18 U.S.C. §891 *et seq.)*, ownership of weapons of mass destruction (18 U.S.C. §2332a), arson (18 U.S.C. §844(1)), possession of child pornography (18 U.S.C. §2253(a)(4)(B)), possession of a semiautomatic assault weapon, (18 U.S.C. §922(v)(1)) or damage to religious property (18 U.S.C. §247(b)).

The idea that there are broad activities of national life that Congress cannot touch because the states also legislate in those areas or legislated in those areas first is contrary to our Constitutional structure.

The Fourth Circuit turned its back on this Constitutional history and development by misinterpreting this Court's decision in *Lopez*. The Fourth Circuit held that under *Lopez*, absent a showing that either the channels or instrumentalities of interstate commerce were involved, Congress cannot rely on its Commerce Clause power unless two showings are made, satisfactory to a court examining the justification for the legislation: (1) the activity regulated by Congress must have a substantial effect on interstate commerce; and (2) the activity regulated must be economic in nature. Having set up this two-pronged test, the Court below concluded that since gender-motivated violence -- the activity regulated by Congress under the VAWA -- is not "economic," there was no basis for Congressional action in this area, regardless of whether such conduct has a substantial

effect on interstate commerce, as four years of Congressional hearings showed it had. [2]

Only the first of these two showings described by the court below can be found in *Lopez* as the basis for invalidating Congressional legislation.

This Court did explicitly hold in *Lopez* that there must be a "substantial effect" on interstate commerce and did provide that Congressional findings of such an effect is not binding on a court.

But the Fourth Circuit's additional prerequisite, *i.e.* that Congress can only regulate an "economic" activity, is based on a misinterpretation of this Court's *Lopez* decision. This Court noted in the plurality opinion in *Lopez*:

> [We] have upheld a wide variety of congressional Acts regulating intrastate economic activity where we have concluded that the activity substantially affected interstate commerce. Examples include . . . intrastate extortionate credit transactions, *Perez*, *supra*, restaurants utilizing substantial interstate supplies, *McClung*, *supra*, inns and hotels catering to interstate guests, *Heart of Atlanta Motel, supra*, and production and consumption of homegrown wheat, *Wickard v. Filburn*, 317 U.S. 111 (1942). These examples are by no means exhaustive, but the pattern is clear. Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.

514 U.S. at 559-60.

In reaching the decision in *Lopez,* neither the plurality opinion by Chief Justice Rehnquist nor the concurring opinion by Justice Kennedy overruled any of this Court's prior Commerce Clause decisions. Indeed, Chief Justice Rehnquist quoted the teaching of *Wickard v. Filburn,* 317 U.S, 111 (1942) that "*even if appellee's activity may be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce* ." 317 U.S. at 125 (emphasis added), quoted in *Lopez,* 514 U.S. at 556. See also *United States v. Wrightwood Dairy Co.* 315 U.S. 110, 121 (1942) ("it is the effect upon interstate commerce or upon the exercise of the power to regulate it, not the source of the injury, which is the criterion of Congressional power").

Included in this Court's analysis in *Lopez* was *Perez v. United States*, 402 U.S. 146 (1971). In that case, this Court upheld the validity of the extortionate credit transaction law, which made it a crime to make any loan coupled with a threat to use violence if the loan is not repaid, 18 U.S.C. §891 *et seq.* The federal statute criminalized loan sharking at the local level because the

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[2] While Congressional findings that the intrastate conduct to be regulated has a substantial effect on interstate commerce is not binding on the courts in determining whether Congress has constitutionally exercised its legislative power under the Commerce Clause, this Court has repeatedly held that "we must defer to a Congressional finding that a regulated activity affects interstate commerce 'if there is any rational basis for such a finding.' . . " *Presault v. Interstate Commerce Commission,* 494 U.S. 1, 17 (1990). *Accord Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 276 (1981); *Katzenbach v. McClung,* 379 U.S. 294, 303

conduct being regulated had a sufficient effect on interstate commerce. What Congress was regulating was not the economic or commercial aspects of the activity, *i.e.*, the making of the loan, but the threat of violence in enforcing collection, a non-economic activity.

The analysis of the Fourth Circuit would undermine numerous other criminal laws passed by Congress where there was no requirement that a "person or thing" moved in interstate commerce.

One group of laws contains as a jurisdictional element a requirement that the activity must "substantially affect" commerce. Thus the federal arson statute, 18 U.S.C. §844(i), reads: "Whoever, maliciously damages or destroys . . . by means of fire or explosive any building . . . used in interstate or foreign commerce or *in any activity affecting commerce* . . . shall be imprisoned . . . " (emphasis added). But arson is surely not an "economic" activity as the term is used by the Fourth Circuit. If Congress's power is limited to regulating only "economic" activity in this sense, then Congress lacks the power to pass such a law or others similar to it, where the only connection to commerce is the addition of the "substantially affects" jurisdictional element to the prohibitions of the law. *See also* 18 U.S.C. §2332a, (prohibiting the use of weapons of mass destruction against a person in the United States "[where] the results of such use affect interstate or foreign commerce"); 18 U.S.C. §247(b) (criminalizing the damaging or destruction of religious property where the offense is "in or affects interstate or foreign commerce"). Yet these laws and others with a similar jurisdictional element have consistently been upheld by federal courts across the country, as shown below.

Other federal laws are based on a theory that the activity regulated by Congress substantially affects commerce, but a showing of such an effect is not a jurisdictional element of the statute, that is, the "substantially affects" requirement need not be shown in every individual case. It is enough that Congress originally concluded that the activity affected commerce to the requisite degree.

Among such laws are the Freedom of Access to Clinics Act, (18 U.S.C §248), laws penalizing possession of semiautomatic assault weapons, (18 U.S.C. §922(v)(1)); laws penalizing the intrastate possession of child pornography (18 U.S.C. §2252(a)(4)(B)) and laws criminalizing the intrastate possession of eagle parts (16 U.S.C. §668).

Lower federal courts have consistently upheld the validity of these enactments and have rejected the "commercial" or "economic" requirement posited by the Fourth Circuit. See *United States v. Jones*, 178 F.3d 479 (7th Cir. 1999)(upholding federal arson statute as applied to the torching of a single private residence); *United States v. Rodia*, 1999 WL 959625 (3d Cir. October 20, 1999)(upholding provision prohibiting the intrastate possession of child pornography based on a "substantially affects" theory); *Navegar Incorporated v. United States*, 1999 WL 798068 (D.C. Cir. October 8, 1999)(upholding provision prohibiting intrastate possession of semiautomatic assault weapon based on a "substantially affects" theory).

See also; United States v. Bramble, 103 F.3d 1475, 1490-82 (9th Cir. 1996) (upholding the provision of the Eagle Protection Act which criminalized the intrastate possession of eagle parts as a valid exercise of Congress'

Commerce Clause power because of the substantial effect on interstate commerce, rejecting the argument that the simple possession of eagle parts has nothing to do with commerce or any economic enterprise); *National Ass'n of Home Builders v. Babbitt,* 130 F.3d 1041, 1049-52 (D.C. Cir. 1997), *cert. denied,* 118 S. Ct. 2340 (1998) (upholding the portion of the Endangered Species Act making it unlawful to possess certain endangered species, including those that exist only on an intrastate basis, holding that "the proper test of whether an activity can be regulated under the Commerce Clause is not whether the activity itself is commercial or economic but rather whether the activity has a substantial effect on interstate commerce"); *United States v. Wilson,* 73 F.3d 675, 685 (7th Cir. 1995) (upholding the constitutionality of the Freedom of Access to Clinics Entrance Act and rejecting the argument that obstructing access to abortion clinics was a non-economic activity that the commerce power could not reach after *Lopez*); *United States v. Parker,* 108 F.3d 28, 30 (3d Cir.), *cert denied,* 118 S. Ct. 111 (1997) (Child Support Recovery Act case in which the Third Circuit rejected the argument that "*Lopez* created a bright line rule establishing that unless an activity is commercial or economic it is beyond the reach of Congress under the Commerce Clause")

In addition, the public accommodation sections of the Civil Rights Act of 1964 were "economic" only in the broadest sense of the term. It was not the act of selling food or the providing of lodging to transient guests that was regulated, but the racial discrimination associated with those activities. In *McClung*, for example, the interstate nexus was the fact that 46% of the food purchased by the restaurant was purchased in interstate commerce, but that was not the activity being regulated. It was the discriminatory conduct in selling food that was

being regulated. Nevertheless this Court affirmed the validity of the law. Like gender violence, racial discrimination might not be "economic" activity, but it is related to and affects interstate commerce.

The concurring opinion of Justices Kennedy and O'Connor in *Lopez* placed the "commercial" requirement in better balance. The concurring opinion noted that "neither the actors nor their conduct [under the GFSZA] has a commercial character, and neither the purposes nor the design of the statute has an evident commercial nexus," 514 U.S. at 580. Justice Kennedy further noted that the federal statute in that case intruded "on a matter of traditional state concern," *i.e.* education, where the States had already acted to prevent the evil at issue here, namely children carrying guns at or near schools, 514 U.S. at 581 (noting that 40 states outlaw the possession of firearms at or near school grounds).

Applying that test to the law at issue here, this Court should sustain the validity of the civil remedy provision of VAWA. The law clearly has the purpose of preventing gender-based violence that imposes substantial economic costs on the nation. Further, the justification for the law is that Congress found that the States could not solve the problem themselves; indeed, they sought the assistance of the federal government in a spirit of cooperative federalism.

The Fourth Circuit did not insist that economic activity must always be the focus of Congress' regulation:

> We could perhaps reconcile with these "first principles" of federalism a holding that Congress may regulate, even in the absence of jurisdictional elements, non-economic activities that are related

> to interstate commerce in a manner that is clear, relatively direct, and distinct from the type of relationship that can be hypothesized to exist between every significant activity and interstate commerce. . . . . In this case, however, we can discern no such distinct nexus between violence motivated by gender animus and interstate commerce. 169 F.3d at 837-38.

With all due respect, Congress did thoroughly and exhaustively show the necessary nexus, as the dissent below explained

> Proper application of the mandated rational basis standard of judicial review simply does not permit the result reached by the majority. That standard requires us to answer a single question: did Congress have a rational basis for finding, as it expressly did, that serious violence motivated by gender animus has "a substantial adverse effect on interstate commerce by deterring potential victims from traveling interstate, from engaging in employment in interstate commerce, and from transacting with business, and in places involved, in interstate commerce ..., by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products." H.R. Conf. Rep. No. 103-711, at 385. Congress so found only after four years of hearings and consideration of massive amounts of testimony, statistics, and other evidence. Analysis of this legislative record unquestionably demonstrates that each one of Congress's findings as to the substantial, deleterious impact of gender-based violence on interstate commerce is grounded in abundant

> evidence. In fact, it is hard to envision more careful legislative consideration, a more complete legislative record, or more amply supported legislative findings. In light of the voluminous, persuasive record and the extensive deliberation supporting Subtitle C, my independent evaluation of Congress's "legislative judgment," *Lopez*, 514 U.S. at 563, 115 S.Ct. 1624, compels me to conclude that Congress had a rational basis for finding that gender-based violence substantially affects interstate commerce.

169 F.3d at 916 (Motz, J, dissenting).

Congress also noted that "the cost" of gender-motivated violence "is staggering." S. Rep. No. 101-545, at 33 (1990). Domestic violence alone is estimated by Congress to cost employers "$3 to $5 billion annually due to absenteeism in the workplace." Women and Violence: *Hearing Before the Committee on the Judiciary*, 101st Cong. 58 (1990) (statement of Helen K. Neuborne) (emphasis added). Furthermore, "estimates suggest that we spend $5 to $10 billion a year on health care, criminal justice, and other social costs of domestic violence." S. Rep.No. 103-138, at 41. Congress also noted "[i]t is not a simple matter of adding up the medical costs, or law enforcement costs, but of adding up all of those expenses plus the costs of lost careers, decreased productivity, foregone educational opportunities, and long-term health problems." S. Rep. No. 101-545, at 33. The Congress report also found:

> Over 1 million women in the United States seek medical assistance each year for injuries sustained by [actions of] their husbands or other partners. As many as 20 percent of hospital emergency

room cases are related to wife battering.

> But the costs do not end there: woman abuse "has a devastating social and economic effect on the family and the community." ... It takes its toll in homelessness: one study reports that as many as 50 percent of homeless women and children are fleeing domestic violence. It takes its toll in employee absenteeism and sick time for women who either cannot leave their homes or are afraid to show the physical effects of the violence.

Id. at 37 (footnote omitted).

Congress further made a finding that the fear of violence "takes a substantial toll on the lives of all women, in lost work, social, and even leisure opportunities." S. Rep. No. 102-197, at 38 (1991) (emphasis added):

> women often refuse higher paying night jobs in service/retail industries because of the fear of attack. Those fears are justified: the No. 1 reason why women die on the job is homicide and the highest concentration of those women is in service/retail industries .... 42 percent of deaths on the job of women are homicides; only 12 percent of the deaths of men on the job are homicides.

S. Rep. No., 103-138, at 54 n.70 (citations omitted).

These findings amply justify the Congressional judgment that violence women has a substantial effect on interstate commerce. The decision of the Fourth Circuit must be set aside.

POINT II

THE DECISION BELOW IS INCONSISTENT WITH THIS COURT'S UPHOLDING OF CONGRESS' EXERCISE OF ITS POWER UNDER THE COMMERCE CLAUSE TO PROTECT THE CIVIL RIGHTS OF ABUSED AND INJURED PERSONS NOT ADEQUATELY PROTECTED BY STATE LAW.

Among the proudest moments in this nation's history was the passage of the 1964 Civil Rights Act, prohibiting discrimination by reason of race and color in places of public accommodation. That law, and the civil rights laws that followed, helped fulfill the promise of the Fourteenth Amendment that all persons are entitled to the equal protection of the laws. Congress prohibited a wide variety of discriminatory acts in employment, housing and education by both private and public entities, finding that the states were not adequately eliminating discriminatory conduct in each of these areas.

This Court sustained the validity of the Congressional enactments under the Commerce Clause in a series of significant cases, including *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) and *Katzenbach v. McClung*, 379 U.S. 294 (1964).

Those decisions explicitly relied upon the Commerce Clause to sustain Congressional power to pass the laws in question. In *McClung*, this Court noted that the public accommodations provision could be sustained only on the basis that a substantial amount of the food that was eventually served at the restaurant had moved in interstate commerce.

> There is no claim that interstate travelers frequented the restaurant. The sole question, therefore, narrows down to whether Title II, as applied to a restaurant annually receiving about $70,000 worth of food which has moved in commerce, is a valid exercise of the power of Congress. The Government has contended that Congress had ample basis upon which to find that racial discrimination at restaurants which receive from out of state a substantial portion of the food served does, in fact, impose commercial burdens of national magnitude upon interstate commerce.

379 U.S. at 298-99.

This Court sustained that finding. It noted that Congress had ample basis to conclude that there were serious and significant "[b]urdens placed on interstate commerce by racial discrimination in restaurants." *Id.* at 299. The effect was described as follows:

> A comparison of per capita spending by Negroes in restaurants, theaters, and like establishments indicated less spending, after discounting income differences, in areas where discrimination is widely practiced. This condition, which was especially aggravated in the South, was attributed in the testimony of the Under Secretary of Commerce to racial segregation. . . . This diminutive spending springing from a refusal to serve Negroes and their total loss as customers has, regardless of the absence of direct evidence, a close connection to interstate commerce. The fewer customers a restaurant enjoys the less food it sells and consequently the less it buys. *Id*

This Court stated:

> We believe that this testimony afforded ample basis for the conclusion that established restaurants in such areas sold less interstate goods because of the discrimination, that interstate travel was obstructed directly by it, that business in general suffered and that many new businesses refrained from establishing there as a result of it.

Id. at 300.

This Court rejected the argument that restaurants constituted "local" activity beyond the reach of Congress to regulate or that Congress' power ended when the food reached its destination at Ollie's Barbecue. It noted that Congress had properly determined that refusal of service to African-Americans imposed burdens on the interstate flow of food and upon the movement of products generally: "where we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end." *Id.* at 303-04.

This Court concluded:

> The power of Congress in this field is broad and sweeping; where it keeps within its sphere and violates no express constitutional limitation it has been the rule of this Court, going back almost to the founding days of the Republic, not to interfere. The Civil Rights Act of 1964, as here applied, we find to be plainly appropriate in the resolution of what the Congress found to be a national

> commercial problem of the first magnitude. We find it in no violation of any express limitations of the Constitution and we therefore declare it valid.

Id. at 305.

Every part of the *McClung* analysis applies to this case. As noted above, the Congressional findings on the effect on interstate commerce of gender-based violence were at least as extensive as the findings upholding the Civil Rights Act at issue in *McClung*. The "local" nature of the activity was not a basis to reject Congressional power to correct the problem. There was also a finding that state enforcement could not resolve the crisis, just as here. The notion that Congress could pass an important civil rights law based upon the movement of $70,000 worth of food products across state lines, but could not provide remedies for domestic violence (which caused $5 billion loss in absenteeism and $10 billion in health care and other social costs), because the first activity was "economic" while the second purportedly was not, should be rejected by this Court.

CONCLUSION

For the reasons stated above, *amicus curiae*, the Association of the Bar of the City of New York requests that the decision below be reversed.

Dated: New York, N.Y.
November 10, 1999

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Nos. 99-5 & 99-29

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In the

Supreme Court of the United States

UNITED STATES OF AMERICA, *Petitioner*,

v.

ANTONIO J. MORRISON, *et al.*, *Respondents*.

CHRISTY BRZONKALA, *Petitioner*,

v.

ANTONIO J. MORRISON, *et al.*, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF AFFIRMANCE

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QUESTIONS PRESENTED

1. Whether 42 U.S.C. § 13981, the provision of the Violence Against Women Act of 1994 that creates a private right of action for victims of gender-motivated violence, is a valid exercise of Congress' power under the Commerce Clause of the Constitution.

2. Whether 42 U.S.C. § 13981 is a valid exercise of Congress' power under the Enforcement Clause of the Fourteenth Amendment to the Constitution.

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.3 Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of affirmance.[1] Written consent for amicus participation in this case was granted by counsel of record for all parties.

Pacific Legal Foundation is the largest and most experienced nonprofit public interest law foundation of its kind in America. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. PLF litigates nationwide in state and federal courts with the support of thousands of citizens from coast to coast. PLF is headquartered in Sacramento, California, and has offices in Miami, Florida; Honolulu, Hawaii; Bellevue, Washington; and a liaison office in Anchorage, Alaska.

PLF has participated in numerous cases concerning the scope of the Commerce Clause, federalism, and the constitutionality of various provisions of federal law. For example, PLF participated as amicus curiae before this Court in *Alden v. Maine*, 119 S. Ct. 2240 (1999); *Printz v. United States*, 521 U.S. 898 (1997); *United States v. Lopez*, 514 U.S. 549 (1995); and *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264 (1981), and is appearing as amicus curiae before the Court this term in *Reno v. Condon*, *cert. granted*, 119 S. Ct. 1753 (1999).

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[1] Pursuant to Supreme Court Rule 37.6, Amicus Curiae Pacific Legal Foundation affirms that no counsel for any party in this case authored this brief in whole or in part; and, furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

PLF seeks to augment the arguments of Respondents by further elucidating the inherent limitations on Congress' Article I authority under the Constitution. PLF believes its public policy perspective and litigation experience dealing with constitutional law will provide a unique viewpoint on the issues presented in this case. PLF believes this additional viewpoint will aid this Court in the resolution of this case.

PLF participated as Amicus Curiae before this Court supporting the Petition for Writ of Certiorari, even though PLF favors affirmance. PLF's purpose in urging this Court to accept this case for review was based on its conviction that this case presents issues of grave import not only to PLF and to the many individuals who support PLF's efforts through charitable contributions, but to the public as a whole, because this case deals with the fundamental question of the constitutional underpinnings for federal government power and for the foundation and maintenance of a free republic. For these reasons, PLF respectfully submits this brief amicus curiae.

STATEMENT OF THE CASE

The federal Violence Against Women Act creates a private right of action against "[a] person . . . who commits a crime of violence motivated by gender." 42 U.S.C. § 13981(c). Petitioner Christy Brzonkala brought a civil cause of action against the Respondents based upon this provision. Respondents defended the suit by arguing that Congress lacks authority under the Commerce Clause to create this federal right. Petitioner United States intervened to defend the statute, arguing that this statute was valid as an exercise of Congress' authority under either the Commerce Clause, or Section 5 of the Fourteenth Amendment. This brief addresses only the former issue.[2]

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[2] Amicus believes this statute is not valid under either the Commerce Clause or Section 5 of the Fourteenth Amendment. However, Amicus
(continued...)

Relying upon this Court's decision in *Lopez*, the district court held this law invalid as an exercise of the commerce power. *Brzonkala v. Virginia Polytechnic Institute*, 935 F. Supp. 779 (W.D. Va. 1996). On appeal before a panel of the Fourth Circuit, the Court of Appeals reversed in a split decision. *Brzonkala v. Virginia Polytechnic Institute*, 132 F.3d 949 (4th Cir. 1997). But on rehearing, in a 7-4 en banc decision, the Fourth Circuit affirmed the lower court and held that the federal government lacks authority under the Commerce Clause to enact the civil cause of action provision of the Violence Against Women Act. *Brzonkala v. Virginia Polytechnic Institute*, 169 F.3d 820 (4th Cir. 1999). On September 28, 1999, this Court issued a Writ of Certiorari. *United States v. Morrison*, 68 U.S.L.W. 3177 (1999), *Brzonkala v. Morrison*, 68 U.S.L.W. 3177 (1999).

SUMMARY OF ARGUMENT

The federal Violence Against Women Act creates a new federal tort. It grants to private individuals the right to bring a civil cause of action against "[a] person . . . who commits a crime of violence motivated by gender." 42 U.S.C. § 13981(c). According to the Petitioners, Congress purportedly enacted this new federal tort pursuant to its power "[t]o regulate commerce . . . among the several states," or, alternatively, pursuant to its power under Section 5 of the Fourteenth Amendment.

As this Court has repeatedly pointed out, the power "to regulate commerce" is broad, but it is not so broad that it is without limit. *Lopez*, 514 U.S. at 564. Accordingly, in *United States v. Lopez*, this Court held that legislation enacted under the Commerce Clause would only be upheld where the statute regulated an activity that "substantially affects" interstate

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[2](...continued)
does not believe further argument is required on the issue of Section 5, because the thoughtful opinion of the Court below, as well as the briefs of other parties, adequately address this point.

commerce. *Id.* at 559. Here, Petitioners argue that the civil cause of action provision of the Violence Against Women Act is legitimate because violence against women, in the aggregate, "substantially affects" interstate commerce within the guidelines set out in *Lopez*.

In support of this position, the Petitioners take a cue from the statement in *Lopez* that Congress had neglected to make any findings that the conduct regulated in that case--possession of a firearm in a school zone--substantially affected interstate commerce. *Id.* at 562-63. They argue that, because Congress has found that gender-motivated violence affects interstate commerce, this Court should defer to Congress' judgment in this case. However, congressional findings do not displace this Court's duty to independently evaluate the legitimacy of congressional legislation. Indeed, Article III of the Constitution imbues this Court with the obligation to check the ambitions of Congress where it attempts to usurp powers not granted to it. Because Congress may not define the reach of its own authority, it is not sufficient that Congress made findings in this case. Instead, this Court must independently judge whether the statute regulates an activity that "substantially affects" interstate commerce.

As amply demonstrated by this case, however, the "substantially affects" standard by itself does not resolve this case. The standard does not provide any discernible line between legitimate and illegitimate exercises of federal power because it does not expressly require that the regulated activity be directly tied to interstate commerce in any way. Insofar as it leaves open the possibility that Congress may regulate intrastate noncommercial activity that has no direct impacts on any identified commerce, it is unworkable in practice, and, as applied, leads to dubious results. Consequently, this Court must devise a standard that leads to sensible results by requiring that the regulated activity be related to interstate commerce in some direct way. Congress' power to regulate under its commerce

authority should depend upon the character of the activity being regulated, the capacity of the actors engaged in the activity, the closeness of the relationship between the regulated activity and the targeted commerce, and whether the federal action adequately respects both the powers reserved to the states and the rights and powers reserved to individuals. By requiring congressional legislation to be tied directly to commerce in these ways, this Court can render judgments that remain truer to the constitutional intent and constitutional structure.

Further, where Congress seeks to regulate conduct, the test of constitutionality cannot depend merely upon "substantial effects," if those effects are indirect and abstract, and it cannot depend upon the aggregation of the effects of all similar activity, because the aggregated effects of *any* noncommercial activity invariably impact commerce. Indeed, in the present case, the alleged impacts to interstate commerce brought about by the aggregated effects of all gender-motivated violence are no more, and considerably less, than impacts brought about by violence in general, or, indeed, by crime as a general matter, or by divorce, death, or child-bearing. This Court should expressly disavow the "aggregation" theory as a means of establishing legitimacy under the Commerce Clause.

Finally, this Court should review Commerce Clause legislation with more searching scrutiny. In particular, this Court should give as much effect to Article I, Section 8's enumeration of the commerce power as it does to other provisions of the Constitution. The enumeration of powers was the primary mechanism by which the Framers of the Constitution sought to curb attempts by Congress to usurp the authority of the states. By deferring to the political branches in the interpretation and application of the Commerce Clause, this Court undermines the intent of the Framers and minimizes the scope of liberty carved out by the Constitution for the welfare of its citizens.

In light of the considerations outlined above, this Court should hold that the civil private right of action provided by the Violence Against Women Act is invalid under the Commerce Clause.

ARGUMENT

I

IN ASCERTAINING WHETHER A REGULATED ACTIVITY SUBSTANTIALLY AFFECTS INTERSTATE COMMERCE, THIS COURT MUST APPLY ITS INDEPENDENT JUDGMENT WITHOUT REFERENCE TO CONGRESSIONAL FINDINGS

Article I, Section 8, of the United States Constitution enumerates 17 specific areas of authority granted to Congress by the people of the United States. Among these, "[t]he Congress shall have power . . . [t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes." U.S. Const. art. I, § 8, cl. 3. According to the Petitioners, this power "[t]o regulate commerce . . . among the several states" implicitly embraces the authority to regulate gender-motivated violence. Congress, we are told, "amassed [evidence] . . . that violence against women has a substantial impact on interstate commerce," Brief for the United States at 6, and therefore, this statute legitimately falls within the political authority of our federal legislative branch.

But it cannot be seriously entertained in logic or common sense that gender-motivated violence constitutes actual interstate commerce. The constitutional enumeration simply cannot allow such a nonsensical interpretation. Yet, even under this Court's boldest commerce decision of recent years, *United States v. Lopez*, the failure of this statute to comport with any ordinary reading of the constitutional text does not necessarily constitute an infirmity. Rather, the test of legitimacy is, according to *Lopez*, whether the conduct in question "substantially affects" interstate commerce.

In *Lopez*, this Court outlined three ways in which legislation would meet the "substantial effects" standard: first, the Court would uphold the regulation of intrastate economic activity where the activity substantially affects interstate commerce; second, the Court would sustain statutes regulating intrastate noncommercial activity if the statute has a jurisdictional element to insure that each application of the statute has the requisite effect on interstate commerce; and last, the Court would uphold a statute if it met the "substantial effects" standard under an "independent evaluation of constitutionality under the Commerce Clause." *Id.* at 559-62. Under this last standard, the Court "of course consider[s] legislative findings, and indeed even congressional committee findings, regarding effect[s] on interstate commerce." *Id.* at 562.

It is clear from the outset that the present case does not fall into either the first or second of these "substantial effects" categories; that is, the private cause of action provision of the Violence Against Women Act neither regulates an economic activity nor contains a jurisdictional commerce element. Thus, *Lopez* leaves this Court--and the parties--with the bare question of whether the activity in question "substantially affects" interstate commerce under the Court's "independent evaluation."

Although this Court in *Lopez* did not state that congressional findings would be dispositive, it considered it significant that Congress had made no legislative findings that the conduct being regulated there--possession of a firearm in a school zone--substantially affected interstate commerce. *Id.* at 563. That language has led the Petitioners to argue strenuously that the diligence of Congress in making legislative findings, and the findings themselves, should be sufficient to satisfy the constitutional test in this case. *See* Brief for the United States at 5-11. That is, according to the Petitioners and their Amici, this case can be resolved simply by answering the

question: has Congress found that gender-motivated violence "substantially affects" interstate commerce?

But if the presence or lack of legislative findings disposes of this Court's "independent analysis" under the "substantial effects" test, the "test," insofar as it determines a *constitutional* grounding for sustaining congressional action, is meaningless. The judiciary, as a co-equal branch of government constitutionally obligated to decide the meaning of the Constitution, cannot allow Congress to define the scope of its own power, otherwise, the whole purpose of the constitutional structure of checks and balances is nullified. An "independent analysis," if it is to have any legitimacy at all, must in fact be independent--it cannot depend upon the judgment of Congress.

The very purpose of establishing three branches under the Constitution was to secure liberty by encouraging a tension among the legislative, executive, and judicial branches. James Madison, in The Federalist No. 44, pinpointed exactly the danger of judicial acquiescence to congressional overreaching:

> If it be asked, what is to be the consequence, in case the Congress shall misconstrue this part of the Constitution, and exercise powers not warranted by its true meaning? *I answer the same as if they should misconstrue or enlarge any other power vested in them . . . . In the first instance, the success of the usurpation will depend on the executive and judiciary departments, which are to expound and give effect to the legislative acts*; and in the last resort, a remedy must be obtained from the people, who can by the election of more faithful representatives, annul the acts of the usurpers.

The Federalist No. 44, at 230 (James Madison) (G. Wills ed., 1982) (emphasis added). Madison understood that the usurpation of illegitimate power by Congress would depend upon judicial sanctions of congressional misconduct. Thus,

deference to legislative judgment in constitutional matters accomplishes precisely the *opposite* of what the Framers had intended by separating government power among three coordinate branches. *See also* The Federalist No. 47, at 246 (James Madison) (G. Wills ed., 1982) (citing Montesquieu) ("'Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary controul.'") Rather than serving as a protective barrier, the Court would instead conspire in the usurpation.

In The Federalist No. 78, Alexander Hamilton expressed his concurrence with Madison's views on this point by specifically stating that the Court's obligation, in the constitutional design, was to prevent congressional arrogations of illegitimate power:

> If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the constitution. It is not otherwise to be supposed that the constitution could intend to enable the representatives of the people to substitute their *will* to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, *to keep the latter within the limits assigned to their authority*.

The Federalist No. 78, at 395 (Alexander Hamilton) (G. Wills ed., 1982) (former emphasis in original, latter emphasis added). Thus, judicial determinations of the proper scope of federal legislative power cannot depend upon the Legislature's conceptions of its own power. Rather, the proper scope of

federal legislative power must depend upon "first principles." *Lopez*, 514 U.S. at 552. Specifically, this Court must look to the Constitution itself and to the fundamental precept that Congress' powers are limited to those enumerated in Article I, Section 8, and further, it must acknowledge that those enumerations have some discernable and concrete import if the principle of enumerated powers is to have any meaning whatsoever.

As this Court opined almost two centuries ago:

> The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing; if these limits may, at any time, be passed by those intended to be restrained?

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803). The answer this Court correctly gave to the question raised in *Marbury* was: to no purpose.

Article III of the Constitution imbues this Supreme Court with a constitutional authority separate and distinct from those powers granted to Congress and the Executive. For what purpose are judges and judicial power created if not to actually render judgment? The answer to this question, also asked in *Marbury*, is: for no purpose. *Id.* at 177-78. Accordingly, this Court must independently evaluate the legitimacy of the Violence Against Women Act as commerce legislation without reference to congressional findings.

II

AN INDEPENDENT EVALUATION OF THE COMMERCE POWER OUGHT TO REQUIRE THAT THE ACTIVITY BEING REGULATED IS TIED TO COMMERCE DIRECTLY; IT MAY NOT REACH CONDUCT THAT HAS TENUOUS CONNECTIONS TO INTERSTATE COMMERCE, PARTICULARLY WHERE THE CONDUCT IN QUESTION FALLS MORE PROPERLY WITHIN THE JURISDICTION OF STATE POLICE POWERS OR INDIVIDUAL AUTONOMY

A. Where Congress Purports to Regulate Under Its Commerce Power, the Court Must Look at the Character of the Activity or Party Being Regulated, the Connection Between the Activity and Interstate Commerce, and the Potential for Infringing upon Rights Reserved to the States or to Individuals

The judicial doctrines the lower courts have adopted in light of this Court's decision in *Lopez* have, unfortunately, failed to endow the Commerce Clause with any more meaning, as a matter of judicial interpretation, than it had prior to *Lopez*. With the single exception of the court below, the federal courts of appeals have repeatedly found that *Lopez* presents no barrier to upholding any manner of legislation as a valid exercise of the federal commerce power. *See, e.g., Solid Waste Agency of Northern Cook County (Solid Waste) v. Army Corps of Engineers*, 191 F.3d 845 (7th Cir. 1999) (migratory bird use justifies federal regulation of isolated wetlands); *National Association of Home Builders (NAHB) v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997) (impacts of biodiversity on commerce sustains federal regulation of insect habitat). The reason these courts have been unable to apply *Lopez* in any meaningful way is that, in *Lopez*, this Court did not articulate a standard of

constitutionality beyond the general prescription that federal enactments under the Commerce Clause may only reach activities that "substantially affect" interstate commerce.

The problem with the "substantially affects" standard is that it does not provide a framework by which a court can distinguish one activity from another in a way that lends substantive import to the phrase "[t]o regulate commerce . . . among the several states." Thus, under the standard, if Congress seeks to regulate interstate commerce in milk, it may as easily regulate the purchase, price, and interstate transport of milk as it may regulate the populace's home consumption of milk, because the latter activity affects interstate commerce in milk as substantially as the former. Yet the character of the activities differs greatly, and it can hardly be countenanced that the power "[t]o regulate commerce . . . among the several states" would properly include the power to dictate the private, noncommercial behavior of citizens in their own homes. Thus, while the "substantially affects" standard is useful, it does not provide a mechanism for drawing lines, let alone "bright" ones. This Court must devise a standard that leads not only to consistent results, but to *correct* results, and it must do so by applying to the word "commerce" some meaning that is faithful to its constitutional intent.

In viewing the full breadth of this Court's Commerce Clause jurisprudence, it becomes evident that there are four principle factors this Court considers when evaluating the legitimacy of federal commerce legislation. First, this Court has looked at the *character* of the activity being regulated--that is, whether the activity in question is itself commercial or noncommercial in nature. *See, e.g., Perez v. United States*, 402 U.S. 146 (1971) (credit transactions). Second, this Court has looked at the *capacity* of the actors engaged in the activity; specifically, whether Congress is regulating the conduct of individuals when they are acting in a commercial capacity, rather than simply as individuals. *See, e.g., Katzenbach v. McClung*,

379 U.S. 294 (1964) (restaurant business purchasing goods in interstate commerce); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (motel business serving interstate travelers). Third, this Court has looked at the *closeness* of the relationship between the regulated activity and the interstate commerce targeted by the regulation. *See, e.g., Wickard v. Filburn*, 317 U.S. 111 (1942) (relationship between wheat produced and consumed on farm and the regulation of the volume of wheat moving in interstate commerce); *United States v. Darby*, 312 U.S. 100 (1941) (relationship between wages and hours of employees and the shipment in interstate commerce of goods produced by those employees). Finally, this Court has considered *comity*: has Congress undermined or interfered with matters that have been regulated traditionally through state police powers or considered within the sphere of individual autonomy. *See Lopez*, 514 U.S. at 564 (criminal law and education traditionally within the sphere of state authority).

Though the interplay of these four factors may not necessarily yield fixed results for every court considering every piece of federal legislation, they surely indicate where Congress' powers are most and least justified. Where an analysis under all of these factors reveals direct connections to commerce without undue interference in state or private matters, congressional authority is unquestioned. But as the scale slides in the opposite direction, congressional authority becomes more doubtful or even nonexistent. Thus, in the example above, analysis under these factors would yield the result that Congress may not regulate one's home consumption of milk because the activity is noncommercial, the actor is not acting in a commercial capacity, the act of home consumption has an attenuated (though substantial) connection to interstate commerce in milk, and the activity falls within the protective sphere of individual discretionary conduct. Similarly, in *Lopez*, the conduct in question was beyond congressional authority because the possession of a gun in a school zone by Alfonso Lopez was

noncommercial, *id.* at 561, did not deal with commercial actors], *id.* at 549, was very tenuously related to interstate commerce, *id.* at 563-64, and fell within spheres of activity--criminal law and education--that were traditionally governed by state law, *id.* at 564.

Even the troubling decision in *Wickard v. Filburn* becomes comprehensible when these four factors are applied to the facts of that case. *Wickard*, it may be said, has stood for the proposition that, through the commerce power, Congress may regulate the consumption of produce grown on one's own land. But is that what this Court intended by that decision? The rationale of *Wickard*--that is, "[h]ome-grown wheat in this sense competes with wheat in commerce," and the production and consumption of wheat, in the aggregate, can have substantial effects on interstate commerce in wheat, *id.* at 128-29--applies equally well to an individual consuming apples grown on a lone tree in his own backyard. But it is unlikely that this Court would similarly uphold an attempt by Congress to regulate the latter activity even if Congress had arrived at the perfectly reliable conclusion that home-grown apples compete with commercially grown apples, and that the aggregate of all such apple consumption has a substantial effect on interstate commerce in apples. Rather, the particular facts of *Wickard* make the decision a little more--but only just--palatable: though the consumption of wheat is not a commercial activity,[3] Filburn was a commercial wheat farmer otherwise subject to the Agricultural Adjustments Act, *id.* at 114, and the sole purpose of the Act was to "control the volume [of wheat] moving in interstate and foreign commerce in order to avoid surpluses and shortages," *id.* at 115. Thus, Filburn's activity arguably met two of the four elements that justify commerce legislation: Filburn's capacity as a commercial farmer, and the closeness

[3] *But see Lopez*, 514 U.S. at 560, characterizing Filburn's conduct as an "economic activity" because he grew wheat as part of his commercial farming operation.

between the regulated activity and the interstate commerce in wheat targeted by the statute.

In essence, the four factors cited here are merely a distillation of the different elements this Court has employed when assessing the legitimacy of federal commerce legislation. Thus, where an activity being regulated was not commercial, such as sexual harassment, the Court has looked to a combination of the other factors to satisfy the test of constitutionality, *e.g.*, the fact that the harassment being regulated takes place in the context of employment. As a result, assessing Commerce Clause legislation by reference to these points respects the doctrine of *stare decisis* because it does not categorically disturb the prior pronouncements of this Court or otherwise upset settled expectations. At the same time, it preserves a sufficiently broad sphere in which Congress may regulate. But the primary virtue is that the application of these four components as a basis for determining whether a federal enactment meets the "substantially affects" test is that it ties the regulated activity to commerce, as well as respects the principles of enumerated powers and federalism. It is these considerations which are lacking in the bare "substantial effects" standard announced in *Lopez*. To the extent these factors supply a methodology by which courts can make an "independent evaluation" as to whether an activity "substantially affects" interstate commerce, they should be observed.

B. Gender-Motivated Violence Is Not Sufficiently Related to Interstate Commerce to Justify Federal Regulation Through the Commerce Clause

Once one views the legitimacy of federal commerce legislation by reference not only to whether the regulated activity "substantially affects" commerce, but by analysis of what activity, exactly, Congress is regulating and how Congress is attempting to achieve commercial ends, it is evident that the present statute does not pass muster.

The provision of the Violence Against Women Act that is being challenged purports to grant individuals a private civil right of action against "[a] person . . . who commits a crime of violence motivated by gender." 42 U.S.C. § 13981(c). Even according to the Petitioners, this provision does not regulate a commercial activity: gender-motivated violence, of whatever character, is clearly not commercial or economic by nature. Further, the statute does not address itself to commercial actors--neither the aggressor nor the victim need be engaged in a commercial activity for the statute to apply. This leaves the legitimacy of the provision resting on two possible bases for justification as an exercise of the commerce power: the closeness of the connection between the regulated activity and impacts to interstate commerce, and whether the regulation refrains from interfering in matters more properly belonging within the sphere of state regulation. As shown below, analysis under both of these factors shows that the statute falls outside the bounds of legitimate commerce legislation.

The relationship between gender-motivated violence and effects on interstate commerce is highly attenuated--so much so that the Petitioners cannot identify a particular interstate commerce impact that Congress sought to regulate, much less show that a particular application of the statute has any effect on interstate commerce whatsoever. The United States cites a catalogue of unrelated interstate commerce effects: first, gender-motivated violence diminishes national productivity because its victims suffer physical and emotional injuries which may cause them to forego employment, miss work days, or lose productivity, and "[a] significant portion of those costs are borne by employers engaged in interstate commerce." Brief for the United States at 23-24 (citations omitted). Second, the government argues, the mere existence or frequency of such violence may discourage women, in particular, from taking jobs "in interstate business" if those jobs require employment at certain hours or in certain locations. *Id.* (citations omitted).

Third, gender-motivated violence may deter potential victims from traveling interstate, particularly by means of public transportation. *Id.* at 25. Fourth, such violence discourages victims or potential victims from transacting business in interstate commerce. *Id.* And finally, gender-motivated violence affects interstate commerce by increasing medical and other costs. *Id.*

Even granting the truth of these claims, this catalogue of interstate commerce impacts proves too much. That is, in order to state a claim under this statute, a plaintiff may not merely allege that a given defendant engaged in conduct constituting a crime of rape or other violent felony. Though it is not entirely clear what Congress meant, the statute explicitly states that it does not apply to "random acts of violence unrelated to gender or for acts that cannot be demonstrated, by a preponderance of the evidence, to be motivated by gender," 42 U.S.C. § 13981(e)--that is, acts "committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender," 42 U.S.C. § 13981(d)(1). Thus, in the trial court, Ms. Brzonkala had to demonstrate that the alleged rape was directed at her by virtue of her sex, and was not directed at her in a more personal way. *Brzonkala*, 169 F.3d at 830.[4] As a result, the impacts described by the United States cannot possibly be laid at the doorstep of the conduct being regulated: the statistics cited by the government do not limit themselves to that subset of all rapes or violent crimes that are

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[4] As stated above, it is not clear what Congress meant by the "gender-motivated" requirement, particularly as it relates to the crime of rape. Unless a rapist can prove that he selects his victims indiscriminately with regard to sex, it is probably a crime that is, by definition, "due, at least in part, to an animus based on the victim's gender"--whether or not the victim is male or female. If that is true, every rape is a federal civil offense under the Violence Against Women Act. However, the courts below required something more.

"gender-motivated," but relate to all rapes and violent crimes against women, period.

And even if every incident of rape and domestic violence could be said to be "gender-motivated," on what basis does the United States, or Congress for that matter, presume that it is these crimes, alone, which cause the asserted impacts on commerce? For most of the impacts--the reluctance of women to take jobs that require unusual hours or unsavory locations; the reluctance of women to travel interstate; *etc.*--the likelihood of being a victim of a mugging or any other crime, whether or not violent or gender-motivated, is as probable a basis for the asserted impacts to commerce as the likelihood of being raped. As to medical costs, the increased costs brought about by physical *violence in any form and motivated by any sentiment* is surely staggering. Insofar as random violence is not only not unusual, but downright commonplace in some cities or neighborhoods, the recitation of these latter impacts as a justification under *Lopez'* "substantial effects" standard for the regulation of gender-motivated violence--and *only* gender-motivated violence--is indefensible.

But what is more telling about the recitation of these random impacts is that, even if these impacts may be proven to be "real" or even "substantial," they are extremely remote from the conduct being regulated. A given act of gender-motivated violence is as likely to have an impact on any one of these particular interstate commerce interests as on another, or on none at all. The impacts themselves are of an extremely general nature, and are utterly dependent upon the random reaction or demeanor of the victim or, as the case may be, the potential victim. Indeed, several of the impacts cited by the United States are not, strictly speaking, brought about by violence, much less gender-motivated violence, but by the *fear* of crime in general, whether or not it takes a violent form. Thus, in part, the United States is asserting that Congress may regulate an activity based upon the *potential* for the activity to substantially affect

interstate commerce--an avenue this Court expressly refused to pursue in *Lopez*. *See Lopez*, 514 U.S. at 564 (rejecting argument that Congress may regulate guns in a school zone because "violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe").

That violence, and gender-motivated violence specifically, has some impact on commerce is unassailable, but it is also unassailable that the impacts of the regulated conduct are indeterminate. And they are indeterminate not so much because Congress did not do its homework, but because the impacts to commerce are random, abstract, remote, and, by their nature, imprecise. For example, the impact to interstate commerce that is caused by women refusing to take public transportation may be offset by the impact of women opting for private transportation, and the impact of women avoiding jobs that require unusual hours or unusual locations may be offset by the impacts of these same women who take jobs in safe locations at regular hours. But under the Petitioners' view, the *net effect* on commerce is not the relevant inquiry; rather, *any impact* may go into the calculation of "substantial effects." As a result, any conduct that may alter human behavior meets the Petitioners' test. In this case, in essence, the asserted impacts amount to no more than stating the obvious fact that crimes of violence in general, and the crime of rape in particular, are sure to affect the collective behavior of women (and everybody else, for that matter), and further, the collective behavior of women (and everyone else) has substantial effects on interstate commerce. But these impacts, however real or substantial as a general matter, are not sufficiently direct to enable Congress to regulate gender-motivated violence.

Finally, the statute fails constitutional muster because it intrudes--deeply--into matters that have traditionally been regulated by the states: rape and other acts of violence. Indeed, the statute allows a victim to bring a federal cause of action

against "[a] person . . . who commits a crime of violence motivated by gender." 42 U.S.C. § 13981(c). The statute further explains:

> (2) the term "crime of violence" means--
>
> (A) an act or series of acts that would constitute a felony against the person or that would constitute a felony against property if the conduct presents a serious risk of physical injury to another, and that would come within the meaning of State or Federal offenses described in section 16 of Title 18, whether or not those acts have actually resulted in criminal charges, prosecution, or conviction and whether or not those acts were committed in the special maritime, territorial, or prison jurisdiction of the United States; and
>
> (B) includes an act or series of acts that would constitute a felony described in subparagraph (A) but for the relationship between the person who takes such action and the individual against whom such action is taken.

42 U.S.C. § 13981(d). In essence, this law makes it a federal civil offense to commit a state or federal crime, and subsection (2)(B) creates new civil law with respect to the treatment of married individuals (that is, for example, because some states do not recognize the crime of "rape" in the marital context, conduct that would not amount to a crime (or civil offense) in these states would become subject to civil liability under the federal law). Thus the statute, by its terms, recognizes the primacy of state law in the area of criminal law and domestic relations at the same time that it expressly overrides such laws.

The statute intrudes into matters reserved primarily to the state--specifically, criminal law and torts. *See Lopez*, 514 U.S. at 564 (noting that criminal law enforcement is an area "where

States historically have been sovereign"). But even more, the interference in state matters is particularly troubling in this case in that the statute purports to provide a *federal* civil remedy for criminal conduct defined by the *state* in which the conduct occurs. That is, because the federal law makes it a civil offense to commit a state felony, the meaning of this federal law differs from state to state depending on how states define their felonies. Thus, conduct that may be actionable in Utah may not be actionable in New York, and furthermore, even conduct that constitutes a felony under state law is recast under the federal law, depending upon whether a court believes that the felony constitutes a "crime of violence" within the meaning of the federal Act. *See, e.g., McCann v. Bryon L. Rosquist, D.C., P.C.*, 998 F. Supp. 1246 (D. Utah 1998); *Crisonino v. New York City Housing Authority*, 985 F. Supp. 385 (S.D.N.Y. 1997).

In one view, the federal statute's deference to state law could be interpreted as homage to the sovereignty of the states. However, the law itself proves the opposite: by casting the federal law to rest upon the body of the laws of 50 states, Congress has effectively reweighed and overruled state policy choices in the formulation of criminal and civil law by substituting its own views of better policy. That is, the states' criminal and tort laws have defined the punishment and liability associated with the regulated conduct according to policy choices weighed by their own state citizens. But the federal law reassigns the relative social and other costs of engaging in the conduct. In short, the states define the crimes, but the federal government defines the punishments. This constitutes a significant interference in state governance of criminal and civil law matters.

The private right of action created by the federal Violence Against Women Act does not regulate a commercial activity and does not regulate individuals acting in a commercial capacity. Further, the activity being regulated has nebulous connections to interstate commerce. Finally, the Act substantially interferes

in and undermines matters that have traditionally been within the province of state police powers. Because the Violence Against Women Act fails to satisfy the factors which justify an exercise of federal commerce authority, the Act is invalid under the Commerce Clause.

C. This Court Should Eschew Entirely the Notion That a Class of Noncommercial Activities May Be Aggregated to Establish a "Substantial Effect" on Interstate Commerce, Because It Invariably Leads to a Limitless Power

As demonstrated through examples above, the effects of any activity of any nature, if aggregated, can invariably be shown to demonstrate real and substantial impacts on interstate commerce. Indeed, depending upon how broadly the government casts the "activity" that is being regulated, the invocation of the aggregation principle announced in *Wickard*, 317 U.S. at 127-28, and repeated in cases such as *Perez*, 402 U.S. at 154 (aggregation of all extortionate credit transactions), and *United States v. Bass*, 404 U.S. 336, 345 (1971) (aggregation of all firearm possession by all convicted felons) can always be shown to "substantially affect" interstate commerce. But, in *Lopez*, this Court expressly rejected any theory under which it would be "difficult to perceive any limitation on federal power." *Lopez*, 514 U.S. at 564. Plainly, the aggregation principle is just such a theory.

For example, the lower courts have latched onto the aggregation principle as a life-preserver for all manner of dubious commerce legislation. Thus, in *Ace Auto Body & Towing, Ltd. v. City of New York*, 171 F.3d 765 (2d Cir. 1999), the Second Circuit Court of Appeals found that federal law preempted municipal towing ordinances because,

> [g]iven that many cities are situated in close proximity to nearby states, e.g., Chicago, Philadelphia, Kansas City, and Washington, D.C., *it is reasonable to infer that municipal towing laws have, in the aggregate, a substantial effect on interstate commerce.* We, of course, defer to the legislative will where any rational basis may be discerned for finding a substantial effect on interstate commerce from a given activity.

Id. at 778 (emphasis added).

And in *NAHB*, the District of Columbia Circuit Court of Appeals upheld federal regulation of intrastate habitat for an insect by reaching the obvious, but numbingly hollow, conclusion:

> In the aggregate, however, we can be certain that the extinction of species and the attendant decline in biodiversity will have a real and predictable effect on interstate commerce.

NAHB, 130 F.3d at 1053-54.

The Seventh Circuit Court of Appeals has also found the aggregation principle particularly useful. In *Solid Waste*, the court upheld the federal regulation of isolated ponds based on the fact that such ponds were visited by migratory birds:

> [W]e find (once again) that the destruction of migratory bird habitat and the attendant decrease in the populations of these birds "substantially affects" interstate commerce. The effect may not be observable as each isolated pond used by the birds for feeding, nesting, and breeding is filled, but the aggregate effect is clear, and that is all the Commerce Clause requires.

Solid Waste, 191 F.3d at 850.

And in *United States v. Jones*, 178 F.3d 479, 481, *cert. granted*, 68 U.S.L.W. 3321 (1999), the Seventh Circuit upheld a conviction under the federal arson statute in the face of a

Commerce Clause challenge by looking at the aggregate effect of all arsons--despite the fact that the statute in question contained a jurisdictional element which, by definition, requires a "case-by-case inquiry." *Lopez*, 514 U.S. at 561.

Thus, in this case, it is hardly surprising that the Petitioners find it dispositive that, because they can cite statistics showing that incidents of rape and domestic violence, as a class, have effects on interstate commerce, the Violence Against Women Act is valid, regardless of the fact that the statute does not purport to regulate all rapes or all acts of violence.

The fact that statistics on rape and domestic violence, and the economic impacts of these activities, are so high may indicate that the problem is critical and that it is even "national" in scope, in the sense that it is not limited to particular geographic areas or particular states. But the fact that the problem is "national" does not make it any more commercial. Yet through the recitation of alarming and truly disgraceful statistics relating to modern life in this society, the Petitioners attempt to justify the federal enactment by showing that particular conduct engaged in--of whatever nature--can be aggregated to demonstrate real impacts upon the economy. But this is invariably the case if the conduct is common enough.

Under the aggregation theory, a noneconomic activity like throwing frisbees is unlikely to meet the "substantial effects" test if only 200 people engage in it, because even the combined acts of 200 people may not be enough to create "substantial effects." But if frisbee-throwing becomes all the rage, members of Congress may start talking about how the unregulated throwing of frisbees is having tremendous interstate commerce impacts on the sale and installation of windows. Yet the conduct in question does not somehow change its character; the only thing that has changed is the frequency of the conduct. Is this sufficient, as a matter of constitutional law, to bring an activity within the domain of the Commerce Clause?

Congress' *constitutional* authority *to regulate commerce* ought not depend solely upon the mere prevalence of conduct. That is, the grant of power in Article I, Section 8, Clause 3, reaches *commerce*, and all that term implies, but the meaning of that term cannot devolve simply upon whether conduct is so common that it can be said to constitute a "national" issue rather than a local one. Instead, it must depend upon whether the conduct being regulated is, more or less, *commercial*, if the Commerce Clause is to have any meaning at all. The "substantial effects" on which the Petitioners rely are effects that wax and wane with the effectiveness of state criminal and civil enforcement procedures or perhaps the moral and social values which dominate our culture. It is a peculiar power indeed if Congress' constitutional authority "to regulate commerce" may be triggered by events wholly unrelated to commerce.

The aggregation principle, sustained by this Court in *Lopez*, 514 U.S. at 561, and bolstered by this Court's reaffirmation in *Lopez* of its prior Commerce Clause cases such as *Wickard*, serves only to obfuscate any meaningful inquiry into the question of whether an activity that "substantially affects" interstate commerce remains true to the constitutional requirement that Congress may only regulate "commerce." Because the aggregation of any conduct can always produce "substantial effects" on interstate commerce, this Court should expressly disavow the aggregation principle as a means of determining whether federal legislation regulates an activity that "substantially affects" interstate commerce.

III

CONGRESSIONAL EXERCISES OF THE COMMERCE POWER SHOULD RECEIVE A MORE SEARCHING SCRUTINY FROM THIS COURT

In *Hodel v. Indiana*, 452 U.S. 314 (1981), this Court explained

> [a] court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends.

Id. at 323-24.[5] Yet this Court has never adequately explained a doctrinal basis for deferring to Congress so completely in the interpretation and application of Congress' commerce powers while applying more exacting scrutiny to congressional enactments that offend other provisions of the Constitution.

For example, in *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983), and later in *Clinton v. City of New York*, 524 U.S. 417 (1998), this Court had little trouble discerning that the Presentment Clause had some definitive meaning inherent in the constitutional text. Although members of this Court disagreed as to its substantive meaning, the majority of this Court did not entertain the notion that Congress was constitutionally entitled to interpret this clause co-equally with the judicial branch in a way that would suggest utter deference to congressional judgment. And, indeed, on the occasions in which this Court has been asked to rule on the validity of noncommerce legislation as legitimate exercises of power under other provisions of the Constitution, the decisions of this Court, though not without controversy, have been unhindered by the marked hesitation with which this Court has approached legislation purportedly enacted under the commerce power. *See, e.g., City of Boerne v. Flores*, 521 U.S. 507 (1997).

Of course, the most searching inquiries into constitutional legitimacy have centered upon congressional enactments which intrude upon rights protected by the Bill of Rights. *See, e.g.,*

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[5] As elaborated upon in Section II of this brief, the Violence Against Women Act would seem, on its face, to fail the second test.

Reno v. American Civil Liberties Union, 521 U.S. 844 (1997). Indeed, in *Lopez*, the concurring justices opined:

> The substantial element of political judgment in Commerce Clause matters leaves our institutional capacity to intervene more in doubt than when we decide cases, for instance, under the Bill of Rights even though clear and bright lines are often absent in the latter class of disputes.

Lopez, 514 U.S. at 579 (Kennedy, J., concurring). But, there is neither more nor less political judgment involved in congressional enactments under the Commerce Clause than in enactments that implicate rights protected by the Bill of Rights.

For example, notwithstanding political judgment, this Court has not hesitated to adhere to and apply the constitutional requirement that Congress observe the formalities of federalism memorialized in the Tenth and Eleventh Amendments, even though the strict boundaries between state and federal spheres of governance are not precisely defined in the Constitution. *See, e.g., Alden v. Maine*, 119 S. Ct. 2240 (1999), *Printz v. United States*, 521 U.S. 898 (1997), *New York v. United States*, 505 U.S. 144 (1992). Yet, the concept of enumerated powers is surely as vital a part of our constitutional structure as the principle of federalism. Further, this Court has shown little trepidation when overturning the political judgments of state governments and state citizens, *see Romer v. Evans*, 517 U.S. 620 (1996), even where the asserted basis for this Court's decisions have little positive constitutional foundation, *see, e.g., Roe v. Wade*, 410 U.S. 113 (1973) (liberty interests in right to abortion); *Griswold v. State of Connecticut*, 381 U.S. 479 (1965) (liberty interest in right of married couples to use contraceptives).

In The Federalist No. 84, Alexander Hamilton expounded upon the gravity of the distinction between the powers enumerated in Article I and the rights protected by the Bill of

Rights. He perceived that the greater threat to liberty existed in excesses of federal power:

> I go further, and affirm that bills of rights, in the sense and in the extent in which they are contended for, are not only unnecessary in the proposed constitution, but would even be dangerous. They would contain various exceptions to powers which are not granted; and on this very account, would afford a colourable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why for instance, should it be said, that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? *I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretence for claiming that power.*

The Federalist No. 84, at 437 (Alexander Hamilton) (G. Wills ed., 1982) (emphasis added). Thus, to contend that this Court has a greater role in curbing federal incursions into the rights protected by the Bill of Rights than in curbing congressional excesses is to prove the validity of Hamilton's fears: Article I, Section 8, ceases being an enumeration of powers; rather, the Bill of Rights turns into an enumeration of liberties.

If this Court continues to adopt a deferential view toward Congress in the determination of what constitutes "commerce" legislation, the only meaningful protection from government tyranny that the citizens may enjoy are those activities that happily fall within the protective sphere of the Bill of Rights or that comport with this Court's concept of what is encompassed in the idea of "liberty" under the Fourteenth Amendment. But it cannot credibly be contended that the Framers of the Constitution were more concerned about government incursions

into the spheres of activity protected by the Bill of Rights, which were amended to the original Constitution, than government attempts to exercise authority in excess of powers enumerated in the original text of that document.

Accordingly, though this Court may construe the grant of authority under the Commerce Clause as having broad limits, it must be decisive when Congress has breached those limits. The Violence Against Women Act constitutes such a breach.

CONCLUSION

While it can be readily conceded that the term "commerce" is susceptible of a broad interpretation, and that a "bright line" rule for deciding Commerce Clause cases may be elusive or nonexistent, the lack of a bright line has never prevented this Court from exercising its judgment with respect to even more amorphous concepts, such as "liberty." *Compare, e.g., Roe v. Wade, supra*, and *Griswold, supra* (finding liberty interests in obtaining an abortion and using contraceptives), *with Washington v. Glucksberg*, 521 U.S. 702 (1997) (finding no constitutional liberty interest in a right to assisted suicide). But even granting the delicate nature of the task, there is no escaping the conclusion that any conceivable line of demarcation will not merely be blurred, but utterly obliterated, if this Court solemnly concludes, as a matter of constitutional interpretation, that "gender-motivated" violence is a proper subject of the federal power "[t]o regulate commerce . . . among the several states."

This Court must draw some line, and that line must be founded upon a functional concept of what is encompassed by the term "commerce" in Article I, Section 8, Clause 3. Further, the line must be drawn by this Court's informed understanding of what the term means, without undue deference to legislative determinations. And finally, that line cannot possibly be drawn so indiscriminately that it can encompass the conduct of gender-motivated violence within the realm of "commerce."

For the foregoing reasons, the decision of the court below should be AFFIRMED.

DATED: December, 1999.

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Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

ANTONIO J. MORRISON, *et al.*,

Respondents.

CHRISTY BRZONKALA,

Petitioner,

v.

ANTONIO J. MORRISON, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF THE INSTITUTE FOR JUSTICE AND THE CATO INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

The Institute for Justice is a nonprofit public interest legal center committed to defending the essential foundations of a free society through securing greater protection for individual liberty and restoring constitutional limits on the power of government. Central to the mission of the Institute is guaranteeing that Congress be limited to its enumerated powers under Article I, Section Eight of the U.S. Constitution.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government, especially the idea that the U.S. Constitution establishes a government of delegated, enumerated, and thus limited powers. Toward that end, the Institute and the Center undertake a wide range of publications and programs. The instant case raises squarely the question of the limits on Congress's power under the doctrine of enumerated powers and thus is of central interest to Cato and the Center.

This brief is co-authored with Professor Richard A. Epstein, one of the nation's leading authorities on constitutional law. Professor Epstein has authored numerous articles on constitutional jurisprudence and the Commerce Clause.[1]

STATEMENT OF FACTS

This case arises out of petitioner's allegations that two members of the Virginia Polytechnic Institute and State University football team repeatedly raped her in a dormitory

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[1] In conformity with Supreme Court Rule 37, the *amici* have obtained the consent of the parties to the filing of this brief and letters of consent have been filed with the Clerk. The *amici* also state that counsel for a party did not author this brief in whole or in part; and no person or entities other than *amici*, their members, and counsel made a monetary contribution to the preparation and submission of this brief.

room shortly after making her acquaintance in September 1994. Petitioner's allegations are sharply contested but have been treated as true for the purpose of the motion to dismiss. Respondent Antonio Morrison acknowledged that a single sexual encounter had occurred but claimed it was consensual. Respondent James Crawford denied that he had had any sexual relations with the petitioner. It is undisputed that the petitioner neither preserved evidence of the alleged rapes nor reported them to the police or to university authorities at, or shortly after, the time they were alleged to have occurred. Five months after the alleged rapes took place, petitioner claims that she identified the two respondents as her assailants. Two months later she filed a complaint with the university under the school's student code of conduct.

The university's internal system exonerated Crawford, but found that Morrison violated the university's code of conduct. Morrison was to be suspended for one year, but he appealed that decision on the ground that the university's internal procedures had not afforded him the process due under the Fourteenth Amendment to the United States Constitution. The university set aside the original findings and ordered a second hearing. The second hearing found Morrison guilty of using abusive language in violation of the student code and recommended a suspension from school. This sanction was overturned by the university Provost, Peggy Meszaros, in August 1995, on the ground that it was excessive relative to other similar cases, not specified. Morrison returned to school on athletic scholarship in the fall of 1995. His conduct was later investigated by the Virginia State Police for two months, who presented their findings to a grand jury, which refused to indict him.

In December 1995, plaintiff brought suit in federal district court. Her complaint alleged that VPI had permitted the creation of a sexually hostile environment in violation of Title IX of the Civil Rights Act of 1964, and that Morrison and Crawford had violated her rights under the Violence Against Women Act (VAWA), §13981(b), to be free of gender-based crimes of violence. Plaintiff's Title IX claim was dismissed in the District Court; that portion of the court's decision was

vacated by a panel of the Fourth Circuit and is not at issue here. 935 F. Supp. 779 (W.D. Va. 1996), *aff'd in part*, 132 F.3d 949 (4th Cir. 1997). Petitioner's VAWA claim against Morrison and Crawford was also dismissed by the District Court on the ground that Congress lacked the power under either the Commerce Clause or section 5 of the Fourteenth Amendment to create the private right of action provided for in VAWA. A Fourth Circuit panel initially reversed that decision, holding that Congress did have authority under the Commerce Clause to enact VAWA. 132 F.3d 949 (4th Cir. 1997). But this panel's decision was set aside and subsequently overturned by the Fourth Circuit en banc, 169 F.3d 820 (4th Cir. 1999), which held that Congress lacked the power to pass VAWA under either the Commerce Clause or the Fourteenth Amendment. The petition for certiorari to review the case under both heads of federal power was granted by this Court.

SUMMARY OF ARGUMENT

The sole question in this case is whether Congress has the power to create a private cause of action against a person "who commits a crime of violence motivated by gender," for which a court may award "compensatory and punitive damages, injunctive and declaratory relief." Petitioner Brzonkala claims that two separate provisions of the United States Constitution – the Commerce Clause and section 5 of the Fourteenth Amendment – confer that power on Congress. Both claims are manifestly mistaken.

The Constitution establishes a government of delegated, enumerated, and thus limited powers. Powers not delegated to the Federal Government are reserved to the states or to the people. Moreover, as James Madison wrote in Federalist 45, the powers of the Federal Government are "few and defined." In particular, there is no general federal police power; that power was reserved to the states. Thus, a fair interpretation of any particular clause in the Constitution must be consistent with that larger design. An interpretation that amounts to a

grant of plenary power to any branch of the Federal Government cannot be right.

Under the Commerce Clause, Congress has power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes." In its application to domestic affairs, the clause was written primarily to ensure the free flow of goods and services among the states and to preclude states from interfering with that commerce. Given that understanding, it has never been disputed that Congress has the power to regulate both the shipment of goods and services in interstate commerce and the instrumentalities of interstate commerce – that is, transportation and communication among the several states. *See Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). By the same token, *Gibbons* explicitly recognized that Congress could regulate neither local commerce (i.e., trade) nor manufacturing, agriculture, or mining, even of goods, foodstuffs, or raw materials intended for shipment in foreign or interstate commerce. *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895). That interpretation of the Commerce Clause was consistent with our system of dual sovereignty. It enabled both Congress and the states to regulate within their respective, authorized spheres while limiting both to those spheres.

With the jurisprudential revolution of the New Deal, however, the power of Congress expanded significantly as the Commerce Clause was read to authorize regulation of even local activities, provided they had a "substantial effect" on interstate commerce. Thus, in *Wickard v. Filburn*, 317 U.S. 111 (1942), this Court upheld a federal statute regulating the production of wheat, even though the wheat never entered the market, because wheat produced in excess of the limits set by the statute was wheat that would not be purchased on the market, the Court said. Notwithstanding that expansion of Congress's power, however, this Court held in *United States v. Lopez*, 514 U.S. 549 (1995), that *Wickard* did not create an all-inclusive federal police power. Accordingly, it found that Congress did not have power under the Commerce Clause to enact the Gun-Free School Zones Act of 1990, 18 U.S.C. §922(q), which forbid any person from knowingly possessing

a firearm within 1000 feet of school premises. And it did so on the ground that the activity "is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." *Lopez*, 514 U.S. at 567.

Lopez governs here. The alleged sexual assault on petitioner "is, in no sense, an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." *Id.* Nor is VAWA saved by the carefully scripted congressional findings that recount the admitted horrors of sexual assault while failing to explain how those actions fall under Congress's power to regulate "Commerce . . . among the several States." *Lopez* rejected similar conclusory findings as grounds for federal power. *Id.* at 564-68. If this section of VAWA is upheld, Congress's regulatory power is effectively plenary and the principle of enumerated powers, which is the foundation of federalism, is a dead letter.

Yet the effort to find authority for VAWA's right of action against private parties under section 5 of the Fourteenth Amendment fares no better. Section 5 grants Congress the power "to enforce, by appropriate legislation, the provisions of this Article." But those provisions – the substantive guarantees of the Fourteenth Amendment – apply only against the states, not against private citizens. Protecting people and property against private violence is the traditional function of state police power. The Fourteenth Amendment authorizes courts and Congress to take measures against civil rights violations by *states*. By no stretch of the imagination were Morrison or Crawford acting as either state officials or under color of state law when they committed their alleged assaults. In no way, therefore, does their conduct trigger Congress's power under section 5. Nor is federal jurisdiction saved by any "finding" of Congress, or strategic admission by state officials, that all state court personnel are subject to gender bias and discrimination in administering state law. Such unproven blanket assertions amount to conclusory presumptions, invoked to escape the limitations that section 5 places on Congress's power. And their truth is clearly belied by VAWA's grant of concurrent jurisdiction to state courts.

ARGUMENT

I. CONSTITUTIONAL STRUCTURE, TEXT, AND HISTORY ALL SHOW THAT CONGRESS'S POWER UNDER THE COMMERCE CLAUSE IS LIMITED.

The Constitution's Commerce Clause provides that Congress shall have the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." In its most recent examination of the clause, *United States v. Lopez*, 514 U.S. 549 (1995), this Court did not endorse, as petitioner Brzonkala suggests, a "pragmatic" approach to interpreting the Commerce Clause. Brief of Petitioner Brzonkala ("Pet. Brief") at 22. Quite the opposite, Chief Justice Rehnquist's opinion for the Court, which is rarely quoted or cited in either Brzonkala's brief or the brief for the United States, contains a comprehensive and principled review of this Court's Commerce Clause jurisprudence.

Chief Justice Rehnquist's opinion for the Court begins by laying down the fundamental premise of the Constitution: "We start with first principles. The Constitution creates a Federal Government of enumerated powers." *Lopez*, 514 U.S. at 552. It then quotes Madison's famous words from Federalist 45: "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." And it concludes by observing that to uphold the government's expansive reading of its power, the Court "would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Lopez*, 514 U.S. at 567-68.

Consistent with that framework, rooted in first principles, the Court identified three possible heads of federal power under the Commerce Clause. The first of these gives Congress the power "to regulate the use of the channels of interstate commerce." *Id.* at 558. The second gives Congress the power "to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activity." *Id.*

Finally, and this is the only category relevant here, Congress has the power "to regulate those activities having a substantial relation to interstate commerce." *Id.* at 558-59. That third category, however, was not meant to afford Congress "an excuse" to regulate any activity that had *any* effect on commerce, however trivial, for in the next breath the Court said that "the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce." In his concurrence, Justice Kennedy drew the ultimate conclusion: "As the Chief Justice explains, unlike the earlier cases to come before the Court here neither the actors nor their conduct has a commercial character, and neither the purposes nor the design of the statute has an evident commercial nexus." *Id.* at 580.

Those conclusions are fully warranted by the text of the Commerce Clause, which on its face confers on Congress the power to regulate that portion of commerce – that is, trade – that takes place with foreign nations, among the several states, and with the Indian tribes. As a matter of both text and ordinary language, commerce was understood as trade – as distinct from manufacturing, agriculture, and mining. Thus, Justice Thomas noted in his concurrence in *Lopez* that "[a]t the time the original Constitution was ratified, 'commerce' consisted of selling, buying, and bartering, as well as transporting for these purposes. . . . As one would expect, the term 'commerce' was used in contradistinction to productive activities such as manufacturing and agriculture." *Id.* at 585-86. Indeed, the distinction between commerce and other activities is driven home if one tries to replace the term "commerce" with the terms "manufacturing" and "agriculture" in the Commerce Clause: "Congress shall have power to regulate manufacturing and agriculture with foreign Nations, and among the several States, and with the Indian tribes." That construction makes no more textual or thematic sense today than it did in 1787.

The Court's conclusions in *Lopez* are congruent with other parts of the Constitution as well. Thus, before the Civil War, it would have been inconceivable for Congress to invoke the Commerce Clause to regulate the *use* of slaves in the

Southern States, even though the Constitution explicitly empowered Congress to prohibit the "Migration or Importation" of slaves after 1808. U.S. Const. Art. I, §9. Likewise, "commerce" is used as a synonym for trade in Art. I, §9, which states that "No Preference shall be given by any Regulation to Any Commerce or Revenue to the Ports of one State over those of another." Consistent with that usage, Article I maintains a strong division between the manufacture that precedes trade and the commerce that flows from it.

The structural limitations on Congress's power were imposed to guard the prerogatives of the states as part of a complex federal system. And federalism, in turn, "was adopted by the Framers to ensure protection of our fundamental liberties." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (cited in *Lopez*). Those limitations were brought home with great force in Chief Justice Marshall's opinion in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), where Marshall explicitly rejected any canon of "strict construction" that would "cripple the government and render it unequal to the object for which it is declared to be instituted. . . . " *Id.* at 188. It is noteworthy, given that thoroughly modern canon of construction, that Marshall held that the constitutional objectives of the Commerce Clause, within our grand constitutional scheme, were fully achieved even when the commerce power was "*restricted* to that commerce which concerns more States than one." *Id.* at 194 (emphasis added).[2] Thus, Marshall's reading explicitly excluded "the completely interior traffic of a State." *Id.* Yet it also proved broad and flexible enough to allow Congress to regulate instrumentalities of interstate commerce, such as the railroad and the telephone, which were neither known nor in use when the Constitution was adopted. *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U.S. 1, 19

[2] Users of this passage often excise the word "restricted" and replace it with "extended." *See* Laurence Tribe, *American Constitutional Law* 232 (1987); Stern, *The Commerce Clause and the National Economy 1933-1946*, 59 Harv. L. Rev. 645, 648 (using "comprehended") (1946). The full passage, with "restricted," is quoted in the decision of Chief Justice Rehnquist. *Lopez*, 514 U.S. at 553.

(1876). At the same time, the Commerce Clause did not authorize Congress to enact any inspection laws, Marshall held, because such laws "act upon the subject before it becomes an article of foreign commerce, or of commerce among the States, and prepare it for that purpose." *Gibbons*, 22 U.S. at 203.

Marshall's basic understanding governed all subsequent Supreme Court decisions until 1937. Thus, *Veazie v. Moor*, 55 U.S. 568 (1853), sustained a *state*-created steamboat monopoly against a Commerce Clause challenge because the monopoly operated only in commerce internal to the state. Likewise, *Kidd v. Pearson*, 128 U.S. 1, 20 (1888), held that the Commerce Clause did not prevent a state from regulating the local manufacture of intoxicating liquors intended for export to other states. And *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895), reached back to *Gibbons* when Chief Justice Fuller wrote, "Commerce succeeds to manufacture, and is not a part of it," *id.* at 12, then insisted on "the independence of the commercial power and of the police power." *Id.* at 13.

That balanced view of the commerce power informed the passage of the Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379 (1887), which incorporated a specific proviso that precluded its application "to the transportation of passengers or property . . . wholly within one State." *Id.* §3. In 1914, however, the constitutional line was overrun with respect "to intrastate carriers as instruments of interstate commerce." *Houston E. & W. Texas Ry. Co. v. United States* ("*The Shreveport Rate Case*"), 234 U.S. 342, 351 (1914). In that case this Court sustained the power of Congress to regulate *intra*state service that operated in direct competition with interstate service. Nonetheless, the *Shreveport Rate Case* did nothing to remove *E.C. Knight's* constitutional prohibition against the federal regulation of all forms of production.

Not until the New Deal and the watershed decision in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), did the Court construe the commerce power as reaching local manufacturing – there, to uphold the federal regulation of labor relations in local manufacturing under the Wagner Act, ch. 372, 49 Stat. 449 (1935). Then, in *Wickard v. Filburn*, 317

U.S. 111 (1942), "which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity," *Lopez*, 514 U.S. at 560, this Court upheld the power of the Secretary of Agriculture to limit the production of wheat on the very farm on which it was consumed. According to Justice Jackson, "[e]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts *a substantial economic effect on interstate commerce*, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'" *Wickard*, 317 U.S. at 125 (emphasis added). In coming to that conclusion, Justice Jackson explicitly applied the *Shreveport Rate Case* while ignoring its key qualification: the commerce power reached "intrastate carriers as instruments of interstate commerce." *Wickard*, 317 U.S. at 123.

Given the New Deal Court's expansive reading of the Commerce Clause, it is important to reassert the soundness, as a matter of first principle, of the Court's interpretation of the clause prior to *Jones & Laughlin* and *Wickard*. In *Lopez*, Justice Kennedy noted that, "in contrast to the prevailing skepticism that surrounds our ability to give meaning to the explicit text of the Commerce Clause, there is widespread acceptance of our authority to enforce the dormant Commerce Clause, which we have but inferred from the constitutional structure as a limitation on the power of the states." *Lopez*, 514 U.S. at 579 (Kennedy, J., concurring). Yet that inference, from constitutional structure, is not only sound but instructive in interpreting the affirmative commerce power, which allows Congress to create a national free trade zone, insulated from the petty restrictions and recriminations of the various states. As Justice Jackson wrote seven years after *Wickard:* "This Court has not only recognized this disability of the state to isolate its own economy as a basis for striking down parochial legislative policies designed to do so, but it has recognized the incapacity of the state to protect its own inhabitants from competition as a reason for sustaining particular exercises of the Commerce Power of Congress to reach matters in which the states were so disabled." *H.P. Hood & Sons v. Du Mond*,

336 U.S. 525, 538 (1949). There the Court disallowed New York's refusal to issue a license to a Massachusetts milk distributor, seeing protectionism in New York's claims about "destructive competition in a market already adequately served." *Id.* at 528.

Thus, the great objects of the Constitution are best served when Congress is understood as having a limited power to regulate the *network* through which commerce courses among the several states, but is understood also as precluded from regulating the internal productive activities that send local goods and services into that network. The great danger, manifest well before *Gibbons*, was that each state, acting out of parochial interests, would hamper or sever the vital interconnections within a single national economic market by imposing crippling restrictions on the shipment of goods, information, and services across state lines. Pursuant to the commerce power, Congress could regulate commerce to overcome that danger.[3]

But most manufacturing, mining, and agriculture are *not* network industries. Thus, a principled refusal to extend the commerce power beyond its structural, textual, and historical limits helps preserve competition between firms in different states, firms that gain access to national markets over a national network guaranteed by the federal government. In that regard, it is often stated that the ever-greater complexity today of social and economic affairs requires a concomitant expansion of the federal commerce power so that its commands can be "translated" from yesterday's horse-and-buggy era to today's Internet economy. *See, e.g.*, Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV., 125, 130 (1995). But that argument gets the economic dynamics precisely backwards. Better and more rapid modes of transportation and communication bring the goods and services of

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[3] Not all such regulation has been cost free, to be sure: witness the creation of the federal monopolies and cartels that eventually arose under the Interstate Commerce Act. *See Wisconsin Railroad Commission v. Chicago, Burlington & Quincy Railroad*, 257 U.S. 563 (1922).

one state into greater competition with those of all other states. That increased competition among the states implies an absence of barriers and hence a *reduced* need for federal policing of the network factors. One might deviate from that conclusion only from a misguided belief that federally-supported monopolies in manufacturing, labor, or agriculture somehow work to the national good, a conclusion that flies in the face of the antitrust laws and this Court's own dormant Commerce Clause and Due Process Clause jurisprudence. *See, e.g., American Trucking Ass'ns v. Scheiner*, 483 U.S. 266 (1987) (application to state taxation of interstate commerce). At this point in our history, it may be too difficult for this Court to extricate itself from its post-1937 Commerce Clause jurisprudence. *See Lopez*, 514 U.S. at 573-74 (Kennedy, J. concurring.) At the same time, the uncertain constitutional foundations of that jurisprudence strongly support this Court's decision in *Lopez* to not extend Congress's commerce power beyond the economic and commercial issues that were the target in *Wickard*.

Both petitioner Brzonkala and the government ignore those basic constitutional principles – as if they did not have to be addressed. Indeed, in analyzing the Commerce Clause, neither of their briefs seems able even to utter the phrase "enumerated powers." Neither tries to explain what activities lie outside the commerce power. Instead, they veer off into diversions. Thus, petitioner Brzonkala claims that the Necessary and Proper Clause, Art. I, §9, justifies an expansive reading of the commerce power. Pet. Brief at 20, 36. Yet petitioner never stops to explain why VAWA is either necessary *or* proper to regulate any activity that has a substantial economic effect on Congress, given the violence it does to our basic constitutional structure of enumerated powers. The Necessary and Proper Clause gives Congress the power only "to make all laws which shall be necessary and proper for carrying into Execution the foregoing powers." U.S. Const. Art. I, §8, cl. 18. It ensures that Congress shall have the power to adopt the *means* that are necessary and proper to achieve its ends. In no sense does it authorize an *expansion* of the set of ends or the repeal of the doctrine of enumerated powers. The

clause adds nothing to the scope of commerce, as indeed Chief Justice Marshall explicitly held in *Gibbons*, 22 U.S. at 187.

Petitioner Brzonkala next claims that the commerce power should receive an especially broad construction in civil rights cases. Pet. Brief at 32-36. Yet neither the text of the Commerce Clause nor this Court's decision in *Lopez* contain any such notion. In fact, *Lopez* cites the key civil rights cases (*e.g., Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964), and *Maryland v. Wirtz*, 392 U.S. 183 (1968)) in the same paragraphs in which it cites the traditional agricultural regulation cases (*e.g., United States v. Darby*, 312 U.S. 100 (1941), and *Wickard*). *See Lopez*, 514 U.S. at 557-78. Then, for analytical purposes, the Court groups those cases together as well: "[W]e have upheld a wide variety of congressional Acts regulating intrastate economic activity where we have concluded that the activity substantially affected interstate commerce. Examples include the regulation of intrastate coal mining, intrastate extortionate credit transactions, restaurants utilizing substantial interstate supplies, inns and hotels catering to interstate guests, and production and consumption of home-grown wheat." *Id.* at 559-60 (citations omitted). The civil rights cases are included in the list, along with cases concerning agricultural regulation, because both kinds of cases involve "*economic* activity." *Id.* at 559 (emphasis added). As in *Lopez*, by no stretch of language or imagination can the activity at issue in VAWA be characterized as "economic."

Finally, petitioner Brzonkala also falsely brands the decision of the Fourth Circuit en banc as having created a "formalistic, bright line" rule, Pet. Brief at 38, even though Judge Luttig's exhaustive opinion frequently quotes and scrupulously applies this Court's precise language in *Lopez* and fully recognizes the inevitable ambiguity that lies in the interpretation of any of the great clauses of the Constitution. 169 F.3d 820 (4th Cir. 1999). Yet not once does the brief of either petitioner Brzonkala or the government seek to respond to the Fourth Circuit's specific reading of *Lopez*.

II. THE VIOLENCE AGAINST WOMEN ACT IS NOT AUTHORIZED UNDER THE COMMERCE CLAUSE AS INTERPRETED IN *UNITED STATES V. LOPEZ*.

A. Lopez Confines Congress's Power Under The Commerce Clause To Matters That Have A Substantial Effect On Economic Activity.

This Court's opinion in *Lopez* sets the framework for analyzing any claim that Congress has the power to create a private right of action for gender-based violence under VAWA. To place VAWA in context, it is useful to review just why this Court found that section 922(q) of the Gun-Free School Zones Act (GFSZA) did not fall within Congress's power under the Commerce Clause. Most critically, the Court distinguished *Wickard* from *Lopez* by noting that *Wickard* "involved economic activity in a way that the possession of a gun in a school zone does not." *Lopez*, 514 U.S. at 560. It then quoted those passages in *Wickard* that made it clear to the *Wickard* Court that the level of home production and consumption of wheat could influence the volume of wheat shipped in interstate commerce. *Wickard*, 317 U.S. at 128, *quoted in Lopez*, at 560-561. And the *Lopez* Court concluded its discussion by noting that "Section 922(q) is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Lopez*, 514 U.S. at 561. Thus understood, the distinction between "affects commerce" and "substantially affects commerce" is not merely an elusive matter of degree. Rather, this Court intended to create a distinction in kind between those activities, done locally, that are subject to Commerce Clause regulation and those that are not.

The force of that analysis is made unmistakable by the Court's explicit rejection of Justice Breyer's effort to develop a network of causation that links the use of guns to the threats that guns pose to interstate commerce. Justice Breyer sought to demonstrate that guns cause violence, that violence disrupts education, and that uneducated students cannot participate in interstate commerce. *See Lopez*, 514 U.S. at 623-24 (Breyer, J., dissenting), criticized in *Lopez*, 514 U.S. at

564-65 (Rehnquist, C.J.). The key point is this: the Court did not reject that argument because of a dispute over some abstract theory of causation; rather, it rejected the argument because it made it impossible for Justice Breyer "to identify any activity that the States may regulate but Congress may not." *Id.* at 564. In principle and in fact, no area of education or child-rearing or anything else could lie beyond the power of the Federal Government. Even when this Court moved from *E.C. Knight* to *Wickard* it held fast to the first principle – that the Commerce Clause operated as part of a system of divided and enumerated powers. Chief Justice Rehnquist was thus driven to the inescapable conclusion: "To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. . . . This we are unwilling to do." *Id.* at 567-568.

That analysis puts into perspective two contentions that could easily lead to confusion in the analysis of this case. The first is that the rational basis test operates as an "open sesame" to Congress. Pet. Brief at 26-27. The second is that the GFSZA would have been upheld but for Congress's failure to supply a detailed set of findings to explain why its legislation had a substantial effect on commerce among the several states. Both contentions are wrong.

B. The Rational Basis Test Does Not Save VAWA Under The Commerce Clause.

The petitioner argues that the constitutionality of VAWA is preordained under the rational basis test. "As *Lopez* reaffirmed, intrastate activity is within the Commerce Power if a 'rational basis' exists for Congress to conclude 'that a regulated activity sufficiently affect[s] interstate commerce.' " *Lopez*, 514 U.S. at 557; Pet. Brief at 26. That contention has often proven true when the Court has refused, under the Due Process Clause, to strike down legislation that restricts the economic liberties of ordinary individuals to engage in certain occupations or trade. After the New Deal, especially, "the

Court declared that it would sustain regulation in the socio-economic sphere if any state of facts either known or reasonably inferable afforded support of the legislative judgment. Even this limited scrutiny soon gave way to virtually complete judicial abdication." Laurence Tribe, *American Constitutional Law* 582 (1987) (citing *Ferguson v. Skrupa*, 372 U.S. 726 (1963), as a case in which the legislation was upheld "for virtually no substantive reason at all."). The implicit, if mistaken, assumption behind such cases is that the political process can protect economic players from potential abuse by the democratic process.

Whatever the contours of the rational basis test as applied to economic liberties, that test takes on a different hue and coloration in *Lopez*. In that context, this Court has made it crystal clear that respecting constitutional restrictions on federal power is vital to preserving the original constitutional design. Justice Kennedy writes: "The statute before us [GFSZA] upsets the federal balance to a degree that renders it an unconstitutional assertion of the Commerce Power, and our intervention is required." *Lopez*, 514 U.S. at 580. Thus, although some deference is due Congress, if that were tantamount to treating Congress as the sole judge of the limits on its constitutional authority, no judicial review would be needed or even possible, and the principle of enumerated powers would amount to an empty promise. Fortunately, the doctrine of deference has not yet rendered judicial review superfluous.

When Congress can show that legislation is directed to local activities that have a substantial economic effect on interstate commerce, then this Court, after *Wickard*, will not examine that judgment to see whether the legislation promotes competition or monopoly. It will leave that determination to Congress. But it will not allow Congress, under its commerce power, to legislate over activities that have no substantial effect on the economic structure of product or service markets, or the price and quantity of goods that are sold in interstate commerce. Deference only to the wisdom of Congress's action; no deference, and certainly no complete deference, to the field of operation of any federal statute.

Lopez embraces a rational basis test, but it is a rational basis test with a kicker. The mere fact that this Court struck down the GFSZA is proof that the rational basis test, as applied to Congress's actions under the Commerce Clause, does not operate as a rubber stamp or an automatic validation of Congress's power. Both history and prudence teach that the risk of congressional aggrandizement is too great to allow for the application of a toothless rational basis test.

C. The Gun-Free School Zones Act, As Amended, Is Not Saved By Congress's Ostensible Legislative Findings.

When Congress first enacted the Gun-Free School Zones Act in 1990, it neglected even to cite its constitutional authority for doing so, much less make findings aimed at showing that the activity regulated – assuming it was regulating under the Commerce Clause – had a substantial effect on interstate commerce. Those omissions have led to misleading and incorrect assertions that the outcome in *Lopez* would have been different had Congress supplied a jurisdictional statement and findings as to why the GFSZA fell under the commerce power. *Lopez*, 514 U.S. at 561-52; Pet. Brief at 27. To be sure, this Court in *Lopez* took note of the place and purpose of legislative findings: "[A]s part of our independent evaluation of constitutionality under the Commerce Clause we of course consider legislative findings, and indeed even congressional committee findings, regarding effect on interstate commerce." *Lopez*, 514 U.S. at 562. But once again, that "independent evaluation" must be properly made. This Court will "consider" those legislative findings, but will not act as a rubber stamp. The mere recitation of findings hardly suffices to pass constitutional muster. Such findings could have led to a different outcome in *Lopez* only if they had shown that the carrying of guns within 1000 feet of a school had a substantial effect on interstate commerce.

The mischievous use of legislative findings was revealed when Congress amended the Gun-Free School Zones Act, 18

U.S.C. §922(q), to add certain findings that supposedly demonstrate an interstate commerce connection. The amended GFSZA contained a list of nine findings that purport to show the effect that guns in school zones have on interstate commerce. *Id.* But those findings establish the truth, if they do, only of matters that have already been found irrelevant in *Lopez*. Indeed, they simply regurgitate, virtually point by point, the constitutionally insufficient factual connections mentioned in Justice Breyer's dissent about the ostensible causal connection between guns and interstate commerce.

Thus, finding (A) notes that "crime, particularly crime involving drugs and guns, is a pervasive, nationwide problem." That point was conceded in *Lopez*, even without specific findings. Yet that truism fails to explain how Congress has power, under the Commerce Clause, to limit the use of guns within 1000 feet of a school. By the logic of finding (A), any prohibition on the use of guns anywhere comes within the commerce power, a proposition that *Lopez* plainly rejects. Finding (B) then states that "crime at the local level is exacerbated by the interstate movement of drugs, guns, and criminal[s]." True enough, but *Lopez* already refused to find that Congress could legislate under the commerce power solely because crime spreads the increased costs of insurance throughout the population and reduces the willingness to travel. Finding (C) states that "firearms and ammunition move easily in interstate commerce and have been found in increasing numbers in and around schools." Finding (D), working in tandem with finding (C), notes that component parts, ammunition, and the raw materials from which guns are made also move in interstate commerce. But in both cases the question is not whether Congress has the power to stop the shipment of guns in interstate commerce but whether the GFSZA regulates activities that have a substantial effect on interstate commerce. Finding (E) observes that "ordinary citizens and foreign visitors may fear to travel to or through certain parts of the country due to concern about violent crime and gun violence, and parents may decline to send their child to school for the same reason." Once again, that truism is no more true of crime in school zones than of crime anywhere else. Finding

(F) notes that "the occurrence of violent crime in school zones has resulted in a decline in the quality of education in our country." True, but again irrelevant. Finding (G) notes that "this decline in the quality of education has an adverse impact on interstate commerce and the foreign commerce of the United States," which once again restates the Breyer dissent. *Lopez*, 514 U.S. at 601 (Breyer, J., dissenting).

Finding (H) raises the specter of the failure of state and local coordination: "States, localities, and school systems find it almost impossible to handle gun-related crime by themselves; even States, localities, and school systems that have made strong efforts to prevent, detect, and punish gun-related crime find their efforts unavailing due in part to the failure or inability of other States or localities to take strong measures." Initially, it seems odd to say that state and local efforts are "unavailing" when children are far safer at school than anywhere else. *See Schools the Safest Place for Kids* (NEA Focus, Aug. 12, 1998); Donohue, Schiraldi, and Ziedenberg, *School House Hype: School shootings and the real risks kids face in America* (Justice Policy Institute 1999) (documenting that the number of children killed by gun violence at schools is about half the number of Americans killed annually by lightning). And the law of Texas, the state involved in *Lopez*, already imposed heavy penalties for those convicted of carrying guns near schools. The states are not caught in some hopeless "prisoner's dilemma," such that no state will impose restrictions on guns near schools for fear that others might not follow. As long as the control of violence makes the citizens of its own state better off, then each state has an incentive to curb that violence, wholly apart from what any other state might do. To find here some deep failure of federalism is to convert the entire criminal code into a set of federal offenses.

That leaves only finding (I), that "Congress has power, under the interstate commerce clause and other provisions of the Constitution, to enact measures to ensure the integrity and safety of the Nation's schools by enactment of this subsection." That "finding" is patently circular, of course. It amounts to saying that GFSZA is constitutional because Congress says it is. *Lopez* stands for nothing if congressional

pretensions like those are allowed to stand. *Lopez* posed a serious substantive standard that requires Congress to identify, as in *Wickard*, the interstate commerce that will be substantially affected by regulation of the activity at issue. Nothing in those findings addresses that question. Congress cannot expand its power simply by asserting the truth of constitutionally irrelevant propositions. This Court should "consider" such canned findings and then reject them as worthless for deciding the issue at hand.

D. Congress's Findings Do Not Provide A Rational Basis To Think That The Private Right of Action Under VAWA Falls Within The Scope Of Its Commerce Power.

The reasons that doom the GFSZA under *Lopez* necessarily doom the private right of action of VAWA. As in *Lopez*, the private action provisions of VAWA do nothing to unclog the channels or instrumentalities of interstate commerce. Thus, VAWA is authorized under the commerce power only if gender-based violence against women substantially effects interstate commerce in ways that gun possession near schools does not. Once again, Congress has resorted to legislative legerdemain in an effort to establish that critical connection. Thus, section 302 contains these findings:

(5) gender-motivated violence has a substantial adverse effect on interstate commerce, by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved, in interstate commerce;

(6) gender-motivated violence has a substantial adverse effect on interstate commerce, by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and demand for interstate products.

Such "boilerplate" findings do nothing whatever to allay the *Lopez* fears of an unlimited expansion of Congress's power. Initially, they do nothing more than restate the obvious fact that gender-based violence has a substantial adverse effect on *all* human activities: after all, local activities are

affected at least as much as national ones. Nor are the economic implications of those effects at all clear. For all anyone knows, gender-based violence could *increase* interstate commerce by encouraging women to move elsewhere, to increase safety purchases, insurance protection, and the like.

No matter: on petitioner Brzonkala's and the government's view, Congress need only find that gender-based violence either deters people from or induces them toward interstate commerce. Such findings represent no serious effort to understand the relationship between violence and anything. In fact, under the implicit methodology, it is impossible to falsify the claim that any given human activity affects interstate commerce. Thus, in principle, all human activity is subject to federal regulation under the Commerce Clause. The Framers need not have enumerated Congress's other powers. Congress can regulate anything it wishes to regulate under this sole power.

Stated otherwise, Congress's purported findings do absolutely nothing to explain the impact of gender-based violence on the price or quantity of any specific product or service in the manner referred to in *Wickard* and now required in *Lopez*. VAWA's findings simply import the words "substantial adverse effect" in a transparent effort to cloak VAWA in *Lopez* garments. At no point do those findings address the key concern of *Lopez*, namely, to identify *some* activities that lie outside the scope of Congress's commerce power. Logically, it cannot be disputed that gender-motivated violence – violence against women, in particular – forms a proper subset of all forms of violence. Therefore, if gender-based violence directed against women alone, or against both women and men, has a substantial adverse (or positive) effect on interstate commerce, then it surely follows that all forms of violence, *wholly apart from gender-based motivation*, must have a *still greater* effect on interstate commerce, positive or negative. Thus, nothing prevents the complete federalization of every nook and cranny of tort and criminal law.

Those gaping difficulties in VAWA's legislative findings are hardly cured by extensive testimony presented at congressional oversight hearings. Such orchestrated, one-sided exercises are political love-fests that follow the same predictable, transparent pattern. Individual members of the House and Senate rise to denounce the impact of violence against women in their state, then call quickly for federal legislation. *See, e.g.*, Hearing on the Violence Against Women Act Before the Subcomm. of Crime and Criminal Justice of the House Comm. of the Judiciary at 7 (June 30, 1994) (statement of Mr. Sangmeister) ("No other civilized nation has ever tolerated this level of violence against women. In this Nation this Congress can no longer fail to take comprehensive action to deal with this serious problem."). Those statements are then followed by grim statistics about the prevalence of crime, by testimony from individual women who have worked with women who have been subject to violent crimes, *see, e.g., id.* at 9 (statement of Vicki Coffey, executive director, Chicago Abused Women Coalition), and by individual women who have been subjected to crimes of violence. *See, e.g., id.* at 14 (statement of Pegi Shriver). Evidence of this sort is then cited uncritically and at great length in the petitioner Brzonkala's, the government's, and numerous *amicus* briefs. Pet. Brief at 6-13; United States Brief at 3-8 (noting the frequency of rape, murder, and domestic violence). Yet even here their use of evidence is curiously selective; not once does either brief mention that for every two violent victimizations of females, there are three of males. Craven, *Sex Differences in Violent Victimization* (Bureau of Justice Statistics, Sept. 1997) (documenting that in 1994 men experienced almost 6.6 million violent victimizations while women experienced 5 million). Not once does either brief refer to the welcome improvement in overall crime statistics in recent years. *See Criminal Victimization 1996* (Bureau of Justice Statistics, Nov. 1997) (noting that between 1995 and 1996, the violent crime rate overall decreased about 10%). Not once does either brief seek to update those studies to address the progress on such matters in recent years.

No one can deny the seriousness of America's crime problem at any level, nor the harrowing condition of the victims of crime, whatever its motivation. But the issue before this Court is not whether the conduct is heinous or wrongful, but whether it forms the subject matter of a federal offense remediable under the Commerce Clause. Here the cumulative nature of VAWA's recitations does nothing to address the specific substantive requirements established in *Lopez*. Testimony that shows that victims of violence should have private federal rights of action also establishes that Congress could, if it chooses, punish all forms of violence under federal criminal law. If VAWA passes constitutional muster, then Congress need only hold preordained hearings and make uncontested findings about the disruption that all forms of violence have on the economy in order to pass the Violence Against People Act (VAPA), calling for *both* private rights of action *and* criminal sanctions against all forms of violence. In a twinkling, VAPA can federalize the entire criminal and tort law, given that accidental harms also substantially affect interstate commerce. If that happens, then the doctrine of enumerated federal powers, and the division of powers between the federal and state governments, becomes a distant memory. VAWA can be sustained only if *Lopez* is overruled or ignored.

That tragic result would mean the end of federalism and the multiplication of sanctions for single actions. All activities caught under VAWA are both criminal and tortious under the law of every state. Moreover, it takes little imagination to foresee that the doctrines of ancillary and pendent jurisdiction will be quickly invoked to bring large numbers of private actions in federal court even in the absence of diversity jurisdiction. Yet neither petitioner Brzonkala nor the government explain why or how this massive migration of litigation from state to federal court improves the administration of justice. VAWA consciously flouts each and every substantive requirement for and limit on congressional power under the Commerce Clause. As long as federalism and enumerated powers count, then VAWA cannot be sustained under Congress's commerce power.

III. THE VIOLENCE AGAINST WOMEN ACT IS NOT AUTHORIZED UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT.

A. The Guarantees Of The Fourteenth Amendment Protect Individuals Only Against State Action.

As an alternative to their Commerce Clause argument, petitioners assert that VAWA's private action provisions are a proper exercise of Congress's legislative authority under section 5 of the Fourteenth Amendment. But that conclusion is flatly inconsistent with the basic architecture of the amendment. Substantively, section 1 of the amendment offers three guarantees against state action: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." In each case the guarantees run only against states, not against private parties. Individuals may bring actions to secure those guarantees against states. In addition, section 5 authorizes Congress "to enforce" the amendment's guarantees through legislation: "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." Congress's power is limited, therefore, by the substantive provisions to be enforced. None of those provisions provides guarantees against private wrongdoing. Thus, Congress has no authority under section 5 to create any cause of action against private parties.

The fatal flaw in the petitioners' argument arises, then, from the undeniable fact that the Fourteenth Amendment is designed to protect against wrongdoing by *states*, while the private action provisions of VAWA are designed to protect against wrongdoing by *ordinary individuals*. The point is made clear by the text of section 13981, which creates a cause of action against "a person (*including* a person who acts under color of any statute, ordinance, regulation, custom or usage of any State)." (emphasis added). By its terms, the unmistakable inference is that VAWA is meant to apply not only to state actors but to persons, such as Morrison and Crawford, who do

not act under color of state law, no matter how broadly defined. At that point the Act runs up against an unbroken line of cases that interpret the Fourteenth Amendment to mean what it says and say what it means.

The basic point was made unambiguously in the *Civil Rights Cases*, 109 U.S. 3 (1883), which struck down the Civil Rights Act of 1875, enacted under section 5, insofar as the Act provided that all persons "were entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances, etc." The Court first noted that the Act did not purport to be "corrective of any constitutional wrong committed by the states." *Id.* at 14. It then observed that the Act "applies equally to cases arising in States which have the justest laws respecting the personal rights of citizens, and whose authorities are ever ready to enforce such laws, as to those which arise in States that may have violated the prohibition of the amendment." *Id.* In concluding, the Court said that "[t]he wrongful act of an individual, unsupported by any [State] authority is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but if not sanctioned in some way by the State, or not done under State authority, his rights remain in full force, and may presumably be vindicated by the laws of the State for redress." *Id.* at 17; *see also United States v. Harris*, 106 U.S. 629 (1883).

The same understanding of section 5 is found in more recent cases. Thus, in *United States v. Guest*, 383 U.S. 745 (1967), Justice Stewart, speaking for this Court, wrote: "It is a commonplace that rights under the Equal Protection Clause itself arise only where there has been involvement of the State or one acting under the color of its authority. *Id.* at 755; *see also District of Columbia v. Carter*, 409 U.S. 418, 423 (1973) ("the commands of the Fourteenth Amendment are addressed only to the State or to those acting under color of its authority."). Most recently, this Court's decision in *City of Boerne v. Flores*, 521 U.S. 507 (1997), struck down the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§2000bb *et seq.*,

insofar as it purported, under section 5, to restore the compelling state interest test of *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), which had been rejected in *Employment Division v. Smith*, 494 U.S. 872 (1990). In so doing, this Court began its opinion with the premise it had articulated in *Lopez*, 521 U.S. at 516: "Under our Constitution, the Federal government is one of enumerated powers." On that ground, the Court then made the larger point that applies here also, namely, that Congress's power under section 5 is limited by the plain text. Thus, although RFRA, unlike VAWA, was directed against state action, "The design of the Amendment and the text of §5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States. Legislation that alters the meaning of the Free Exercise Clause cannot be said to be enforcing the clause." *Id.* at 519. That point applies with equal force here: section 5 does not empower Congress to enlarge upon or otherwise alter the provisions it authorizes Congress to enforce through legislation. Those provisions afford protection against states, not against private parties. Insofar as VAWA expands Congress's power beyond constitutional bounds, it must fail.

B. The Congressional Findings Offered In Support Of VAWA Do Nothing To Fix The Jurisdictional Gaps In The Petitioners' Case.

To try to avoid a rudimentary application of the state action limitation, Congress again published predigested findings and carefully scripted testimony aimed at establishing the missing element of state action. Thus, VAWA stipulates:

> (7) a Federal civil rights action as specified in this section is necessary to guarantee equal protection of the laws. . . .
>
> (8) victims of gender-motivated violence have a right to equal protection of laws, including a system of justice that is unaffected by bias or discrimination and that, at every relevant stage, treats such crimes as seriously as other violent crimes.

But those findings fall short of establishing any element of state action in VAWA cases. At most the findings make veiled hints that state court systems have been deficient in guarding against the dangers of gender-based discrimination, chiefly against women. Even if that point were true, it would justify at most some action taken against those state officials whose behavior flouted the applicable constitutional norm. But the private action section in VAWA does not question or remove the absolute immunity of judges or prosecutors. Nor does it establish a system of disciplinary review of judges or prosecutors to see that they have toed the line in cases of gender-based violence. Indeed, far from treating state judges as derelict in their handling of gender-based cases, VAWA pours further resources into the state civil and criminal law system. More astonishingly, section 13981(e) provides that "Federal and State courts shall have concurrent jurisdiction over actions brought pursuant to this Title," which hardly suggests a distrust of the fairness and ability of state court judges to apply and administer the substantive provisions of this act.

Worse still, the carefully rehearsed testimony on the point does not begin to show any of the discrimination in gender-based crimes that purport to drive the private right of action under VAWA. None of the testimony distinguishes between the performance of the courts in different states or even the differences in the performance of different divisions, or different judges, within any given state. *See*, the detailed dissection of the findings offered by Judge Luttig, App. 151, Section 3(a). Findings on that point are thus subject to the same criticism the Court directed toward the 1875 Civil Rights Act in the *Civil Rights Cases*: a uniform statutory provision is defective insofar as it fails to distinguish between states with the "justest" laws and states whose practices may, on some occasions, violate the requirements of equal protection. The law professors' *amicus* brief in support of the petitioners blithely dismisses that point by noting that to have granted any direct action against state officials for discriminatory underprosecution "would have required state and local

officials to defend their actions against charges of sex discrimination in federal court." Brief of Law Professors at 28. But the more plausible explanation for that omission is that Congress and the states have entered into a cozy alliance whereby the states agree to denounce everyone (and thus no one) in order to gain additional prosecutorial power in gender-based civil rights cases. It would create nothing short of a national scandal to single out by name any judicial decision or judge for failing to meet the appropriate constitutional standards, and to then document that charge chapter and verse. But the across-the-board condemnation of all state court institutions carries no such sting and provokes no such outrage precisely because everyone knows that its bland declarations have more to do with propping up the untenable constitutional foundations of the private action provisions of VAWA than examining with any rigor the professional conduct of any state official. Any dispassionate analysis of this topic would have to examine the constructive actions that state legislatures and public officials have taken over the years, and give at least some passing recognition to the major reductions in crime, including rape and other violent acts against women, under the current law. *See Criminal Victimization 1996* (Bureau of Justice Statistics, November 1997) (noting that between 1995 and 1996, the violent crime rate overall decreased about 10%); *Criminal Victimization 1994* (Bureau of Justice Statistics, April 1996) (documenting that the crime rate for rape/sexual assault fell 13% between 1993 and 1994 and 31% between 1992 and 1994).

In sum, these findings suffice only if this Court gives complete deference to legislative findings that utterly fail to support the creation of this private remedy. In the end, *City of Boerne* dooms this approach under section 5 for the same limited-government reason that *Lopez* dooms it under the Commerce Clause. "[A]s broad as the congressional enforcement power is, it is not unlimited." *City of Boerne*, 521 U.S. at 518 (quoting *Oregon v. Mitchell*, 400 U.S. 112, 128 (1970)). Even under a generous rational basis test, Congress cannot transmute a private party into an agent of the state; and it cannot, by mere say-so, declare all state agents derelict

in the discharge of their duties without *once* considering *any* contrary evidence.

Petitioner Brzonkala seeks to escape that conclusion by noting scattered dicta of Justices Clark and Brennan to the effect that Congress has the power to punish purely private action under section 5. *See Guest*, 383 U.S. at 762 (Clark, J., concurring), 782-784 (Brennan, J., concurring in part and dissenting in part). But the context there was wholly different. *Guest* arose out of a conspiracy of six private white individuals who sought to deny black citizens their rights by causing their arrest through false reports about criminal actions. The Court held that the interconnection between private and official conduct met the Fourteenth Amendment's state-action requirement. *Id.* at 756. But even if those defendants' actions were treated as purely private, the formulations of both Justices Clark and Brennan required that the private conduct charged "interfere with Fourteenth Amendment rights." *Id.* at 762, 782. By no stretch of the imagination did the defendants here act to violate the due process or equal protection rights of petitioner Brzonkala. Were the Court to let such a conclusion stand, private misconduct would be transmuted into public misconduct and the Fourteenth Amendment's state-action requirement would be obliterated. *Guest* applies only to situations where private parties seek to enlist the cooperation of public officials to deprive people of their Fourteenth Amendment rights, a far cry from the situation here.

CONCLUSION

The Constitution creates a government of limited, enumerated powers. It does not confer a general police power on the Federal Government. That power was reserved to the states. Petitioner Brzonkala and the government have sought to justify VAWA's private right of action under both the Commerce Clause and section 5 of the Fourteenth Amendment. But they fail to show how gender-based crimes have a substantial effect on interstate commerce as that test was set forth in *Lopez*; or how gender-based crimes constitute state action as required under the *Civil Rights Cases*.

Petitioners fail to show, in short, that Congress has the power to enact the statute. The great teaching of this Court for nearly two centuries now was set forth in *Marbury v. Madison*, 5 U.S 137, 176 (1803): "To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?" There being no constitutional grant of power to support this cause of action, the decision of the Fourth Circuit should be affirmed.

Respectfully submitted,

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Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

ANTONIO J. MORRISON, *et al.*,

Respondents,

CHRISTY BRZONKALA,

Petitioner,

v.

ANTONIO J. MORRISON, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with membership of more than 10,000 attorneys and 28,000 affiliate members in all fifty states. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates.

The NACDL was founded in 1958 to promote research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. Among the NACDL's objectives are to ensure the proper administration of justice and that criminal statutes are construed and applied in accordance with the United States Constitution.

The issue before this Court is the constitutionality of the Violence Against Women Act ("VAWA"). Although the criminal provisions of VAWA are not presently before the Court, the Court's ruling as to whether Congress acted within its permissible authority under the Constitution in creating the civil cause of action codified at 42 U.S.C. § 13981 will have a significant effect upon the growing trend of federalization of criminal law. The NACDL accordingly has a significant interest in the outcome of this case.

The NACDL asks the Court to hold Section 13981 unconstitutional, as it exceeds Congress's authority and disturbs the federal relationship between the national and State legal systems. *Amici curiae* in favor of the Petitioners have suggested

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[1] The parties have consented to the submission of this brief. Their letters of consent have been filed with the Clerk of this Court. Pursuant to Supreme Court Rule 37.6, none of the parties authored this brief in whole or in part and no one other than *amicus*, its members, or counsel contributed money or services to the preparation or submission of this brief.

that international law both mandates and authorizes Congressional enactment of Section 13981, and this argument, if true, presumably would also lead to federal criminal laws enacted on the same extra-constitutional basis. NACDL addresses these arguments as well, for they no less threaten to disrupt the current systems of criminal law.

SUMMARY OF ARGUMENT

1. In creating a general tort cause of action in Section 13981, Congress exceeded the bounds of its authority and disrupted the balance between state and federal systems of law. The Constitution creates a federal structure that places responsibility for the creation and development of the general common law with the State legislatures and courts. Article III limits the substantive jurisdiction of the federal courts, and the scope of the matters that Congress may assign to them, primarily to federal officers and institutions, or core federal functions, while placing few substantive restrictions on State legislation or Common Law. With respect to those latter areas, the federal government is restricted to providing an alternate forum, while applying the State law as the rule of decision.

The Framers pointed to these features as deliberate protections against the expansion of the federal government's lawmaking power to consume that of the States. The First Congress, in enacting the Judiciary Act of 1789, directed that all federal courts were to apply the law of the respective States as the rule of decision in cases brought before them. This Court in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), restated that restriction and emphasized its Constitutional basis: "*There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or "general," be they commercial law or a part of the law of torts.*" *Id.* at 78 (emphasis added). The Constitution does not permit Congress to enact a general law of torts or to create private civil causes of action that do not have a

clear Constitutional violation element or do not otherwise relate directly to federal enumerated powers. Rather, the Constitution sets out a sophisticated scheme of cooperation and innovation among the respective States to enhance and enforce popular control of the common law as part of the guarantee of republican government.

Enactment of Section 13981 threatens the States' enforcement of criminal law in addition to its intrusion into the State sphere of common law. The logic sustaining a civil cause of action such as Section 13981 necessarily opens the door to the creation of a general federal criminal code that could ultimately overwhelm and replace the State systems.

Among the more vocal objections to the Constitution at the time of ratification was the fear of unlimited federal power to legislate. In response, the Framers contended that the federal criminal legislative power was restricted to the enumerated crimes listed in the Constitution, and little else. The Constitution's proponents pointed to the broad and general jurisdiction of the States to legislate and try cases as the principal bulwark in defense of the common law. For most of the two centuries following, the greater part of criminal law was created, maintained and enforced by the respective States.

Despite the growing trend in recent decades for Congress to federalize more and more crimes, the Constitutional principles controlling remain the same. Federalization of crime harms the reputation and effectiveness of State criminal law systems while it adds to the burdens on, and potential harms resulting from, the power of the federal government. In a truly federal system, the Congress cannot unilaterally duplicate the general criminal or tort laws of the States. If the Congress can, as it has in the case of VAWA and Section 13981, proclaim the State systems defective while creating a duplicate legal code, it would only be a matter of time before the State systems are abolished as redundant.

2. A violation of the Fourteenth Amendment cannot occur without some significant involvement of a State, a State official, or one purporting to act under color of State law. *Moose Lodge No.*

107 v. Irvis, 407 U.S. 163 (1972). The United States in its Brief implicitly concedes this point. All congressional enactments addressing private actors' Fourteenth Amendment violations have limited their reach to acts taken in coordination with or on behalf of a State, or under color of State law. *E.g.*, 18 U.S.C. § 242; 42 U.S.C. § 1983; *see National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179 (1988).

Although purported to be in enforcement of the Fourteenth Amendment, Section 13981 makes none of the above distinctions. Its stated elements for a cause of action replicate those of a general cause of action sounding in intentional tort. The Section affixes liability not only to those who act with the State or under color of State law, but also to anyone else. The only additional element of the statute is the gender animus motivation requirement, yet motivation, as opposed to intent, has always been irrelevant to liability in either common law tort or constitutional torts. This Court has consistently rejected the notion that the Fourteenth Amendment creates any general federal tort liability. *Daniels v. Williams*, 474 U.S. 327 (1986); *Parratt v. Taylor*, 451 U.S. 527 (1981). Section 13981 accordingly is not an appropriate exercise of the Congress's enforcement powers under the Fourteenth Amendment.

3. Certain *Amici curiae* in support of the Petitioners have suggested in their Brief that both customary international law and the treaty obligations of the United States authorize, if not mandate, enactment of Section13981. This argument is not properly before the Court as one of the questions presented on certiorari, and should be dismissed. Supreme Ct. Rule 24.1(a); *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 97 n.4 (1991). It also was not one of the specific grounds cited by Congress as authority for the statute. If the Court should take up this argument, it nonetheless fails because the Constitution takes precedence over general international law and over treaties. *Reid v. Covert*, 354 U.S. 1 (1957). Nor can Congress find sources of authority in international law or treaties separate from the Constitution, which

is the sole source of authority for Congress and the United States. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 270 (1992).

ARGUMENT

Amicus in support of the Respondents agrees with and supports the arguments of the Respondents with respect to the substantive scope of the powers that Congress may exercise under both the Commerce Clause and the Enforcement Clause of the Fourteenth Amendment. As the Respondents treat this aspect of the case exhaustively in their Brief, *amicus* wishes instead to present to the Court a supplemental argument: The methods chosen by Congress to implement this power in Section 13981 are inconsistent and inappropriate within the federal structure created by the Framers.

I. SECTION 13981 HAS AN OVERBREADTH THAT DISTURBS THE CONSTITUTIONAL BALANCE OF STATE AND FEDERAL SYSTEMS OF LAW.

This Court long ago set forth that the Congress's Commerce Power "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, *other than are prescribed in the constitution*." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189-90 (1824) (quoted in *United States v. Lopez*, 514 U.S. 549, 553 (1995)) (emphasis added); *see also Lopez*, 514 U.S. at 568 (Kennedy, J., concurring). In recognition of the Court's "authority and responsibility to review congressional attempts to alter the federal balance," *Lopez*, 514 U.S. at 575 (Kennedy, J., concurring), the Court must consider Section 13981 within the context of "the design of the Government and ... the significance of federalism in the whole structure of the Constitution." *Id.*

If one assumes that Section 13981 were within the substantive scope of the Commerce Clause, that assumption would "not mitigate [the Court's] duty to recognize meaningful limits on

the commerce power of Congress." *Id.* at 580. For just as the Court has "inferred [the dormant Commerce Clause] from the constitutional structure as a limitation on the power of the States," *id.* at 579, the Court must similarly read from the construction of the entire Constitution a restriction on the power of Congress. The Court "must inquire whether the exercise of national power seeks to intrude upon an area of traditional state concern." *Id.* at 580.

A. States Determine the Common Law of Torts.

Section 13981 creates a cause of action in a victim of gender-motivated violence against another individual. 42 U.S.C. § 13981(c). The defendant individuals may include those "who act[] under color of any statute, ordnance, regulation, custom or usage of any State," *id.*, but are not limited to that class. Both State and federal courts have concurrent jurisdiction over this cause of action. *Id.* § 13981(e)(3). The statute restates a general cause of action sounding in tort for violence, qualified only by the element that a gender-based motivation propels the act.

The Framers at the time of the Constitutional Convention knew the variety of civil actions available at common law for redress of violent torts. *See, e.g.*, 3 William Blackstone, Commentaries *120-21 (describing forms of action including *trespass vi et armis*, assault, *insultus*, battery, and mayhem, among others). They were cognizant of the difference between torts committed among private individuals, and torts suffered at the hand of the Sovereign. *Id.* at *116 (for injury by the Crown, "the remedy in such cases is generally of a peculiar and eccentrical nature."). More tellingly, the Common Law even recognized torts raising gender-specific issues. *Id.* at *140, *143 (remedies for violence to spouses).

Against this background, the Framers did not envision the federal government invoking its legislative or judicial power to the broad and general extent that Section 13981 does. Article III, Section 2 of the Constitution delimits the federal "judicial Power" to encompass actions wherein the parties are specially identified:

the United States itself, the States as entities, foreign officials, and individuals of diverse citizenship[2]. U.S Const. art. III, § 2. Additionally, the specified subject matters of the Constitution, treaties, admiralty and federal laws merit federal jurisdiction. *Id.*

The Constitution places no similar restrictions upon the jurisdiction of State courts, other than to require the supremacy of the "Constitution and the Laws of the United States which shall be made in pursuance thereof" (including treaties) to State laws as rules of decision in the State courts.[3] *Id.* art. VI, cl. 2. The Constitution's guarantee of republican government may be seen as further assurance that the States might retain control of the substantive Common Law for individual wrongs, acting through their duly elected legislatures. *Id.* art. IV, § 4.

Absent the presence of core federal questions or federal officers, the federal judicial power only provides to private individuals a forum, rather than the governing law of decision, for their actions. The First Congress, including certain of the Framers, adhered to this concept in enacting the Judiciary Act of 1789. This Court, earlier in the present century, has had occasion to reassert this principle when interpreting and applying Section 34 of the Judiciary Act of 1789, also known as the Rules of Decision Act.

> Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature or by its highest court in a decision is not a matter of federal concern. *There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or "general," be they commercial law or a part of the*

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[2] Enactment of the Eleventh Amendment further restricted the scope of federal judicial power. U.S. Const. amend. XI.

[3] The Constitution removes certain subjects from the legislative authority of States. *Id.* art. I, § 10.

> *law of torts.* And no clause of the Constitution purports to confer such a power upon the federal courts.

Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (Brandeis, J.) (emphasis added). Federal courts have since therefore regularly looked to applicable State law for their rules of decision in cases raising issues of common law.[4] The Rules of Decision Act is codified at 28 U.S.C. § 1652 ("The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decisions in civil actions in the Courts of the United States, in cases where they apply.")[5]. *See also* 1 James Kent, Commentaries on American Law 318 (Legal Classics ed. 1986) (1826) ("we have not, under our federal government, any common law, considered as a source of *jurisdiction*") (emphasis original).

"It is no reflection on either the breadth of the United States Constitution or the importance of traditional tort law to say that they do not address the same concerns." *Daniels v. Williams*, 474 U.S. 327, 333 (1986). "Our Constitution deals with the large concerns of the governors and the governed, but it does not purport

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[4] In reversing nearly one hundred years of interpretation of the Constitution and the Judiciary Act, this Court in *Erie* corrected "an unconstitutional assumption of powers ... which no lapse of time or respectable array of opinion should make us hesitate to correct." 304 U.S. at 79. This because "the unconstitutionality of the course pursued has now been made clear, and compels us to do so." *Id.* at 77-78.

[5] When tort claims arise against federal officers or employees in the course of their duties, an area wherein the argument for application of a general federal law might be strongest, Congress nonetheless has directed that the relevant State tort law shall apply. Federal Tort Claims Act, 28 U.S.C. § 2674 (United States liable "in the same manner and to the same extent as a private individual under like circumstances").

to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society." *Id.* at 332.

Additional provisions of the Constitution show primary reliance on the State judicial systems to enforce the common law with respect to individuals. Full faith and credit "given in each State to the public Acts, Records, and judicial proceedings of every other State" assures that State courts will respect each other's process, apply the appropriate State law as a rule of decision according to choice of law principles, and recognize and enforce their respective common law judgments. U.S. Const. art. IV, § 1; *see* 1 James Kent, Commentaries on American Law, *supra*, at 377 ("The state courts are left to infer their own duty from their own state authority and organization"); *cf.* 28 U.S.C. §§ 1738-1739 (federal courts to give full faith and credit to State "Acts, records, and judicial proceedings" as would the courts of such State); *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1984) (O'Connor, J.) (fact that "claim is within the exclusive jurisdiction of the federal courts does not necessarily make § 1738 inapplicable.").

The federal plan also calls upon States to deliver up fugitives upon request, in furtherance of their respective criminal jurisdictions. U.S. Const. art. IV, § 2, cl.2; *see generally California v. Superior Ct. of Calif., San Bernardino Cty.*, 482 U.S. 400 (1987) (O'Connor, J.). But "[s]upervision over either the legislative or the judicial action of the states is in no case permissible except as to matters by the constitution specifically authorized or delegated to the United States." *Erie*, 304 U.S. at 78-79; *see Sun Oil Co. v. Wortman*, 486 U.S. 717, 749 (1988) (O'Connor, J., concurring in part) (deviation from full faith and credit "ignores the language of the Constitution and leaves it without the capacity to fulfill its purpose").

All of these constitutional provisions detail a fairly intricate scheme designed to preserve and enhance the workings of the separate State judiciaries, individually and in cooperation, as the primary means for the enforcement and derivation of the common

law of torts. This system has operated without hindrance for the life of the Constitution, even as the Reconstruction Amendments otherwise altered the state-federal relationship. *See Sun Oil Co. v. Wortman*, 717 U.S. at 730 ("If a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it.") (quoting *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922)). The retention by the States of primary responsibility for the day to day redress of wrongs at common law between individuals spares the federal government a great burden and frees it to focus on matters peculiarly national or otherwise integral to its enumerated powers. Conversely, it retains to the people of the several States the safeguard of greater control of an important aspect of their daily lives: their interaction with governmental enforcement powers. Section 13981 contravenes these constitutional principles, as it is an "interference [that] contradicts the federal balance the Framers designed and that this Court is obliged to enforce." *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring).

B. A General Federal Criminal Code Threatens to Subsume State Criminal Law.

Congress's enactment of legislation such as Section 13981 also threatens State criminal law regimes. For if the federal government may broadly declare the State legal systems to be so biased or flawed as to be broken, and it therefore may bypass the State courts with new federal civil causes of action, there is nothing in this logic to stop the Congress from enacting a general federal criminal code to take over day to day law enforcement from the States. This threat cannot be reconciled with a federal constitution.

This danger was one raised by antifederalist critics of the Constitution, and was expressly disavowed by the Framers. In response to the objection that federal legislative power "would tend to render the government of the union too powerful, and to enable it to absorb in itself those residuary authorities, which it

might be judged proper to leave with the states for local purposes," Alexander Hamilton wrote:

> There is one transcendent advantage belonging to the province of the state governments which alone suffices to place the matter in a clear and satisfactory light – I mean the ordinary administration of criminal and civil justice. This of all others is the most powerful, most universal and most attractive source of popular obedience and attachment. It is this, which – being the immediate and visible guardian of life and property – having its benefits and its terrors in constant activity before the public eye – regulating all those personal interests and familiar concerns to which the sensibility of individuals is more immediately awake – contributes more than any other circumstance to impressing upon the minds of the people affection, esteem and reverence towards the government. This great cement of society which will diffuse itself almost wholly through the channels of the particular governments, independent of all other causes of influence, would ensure them so decided an empire over their respective citizens, as to render them at all times a complete counterpoise and not infrequently dangerous rivals to the power of the union.

The Federalist No. 17 (Alexander Hamilton) at 102, 104 (New York 1788) (Legal Classics ed. 1983).

This theme and assurance continued throughout the arguments in favor of ratification of the Constitution.

> The powers delegated by the proposed constitution to the federal government, are few and defined. Those which are to remain in the state governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negociation, and foreign commerce .... The

> powers reserved to the several states will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people; and the internal order, improvement and prosperity of the state.

The Federalist, *supra*, No. 45 (James Madison) at 82. In maintaining that the "federal and state governments are in fact but different agents and trustees of the people, instituted with different powers and designed for different purposes," Madison averred that the prevention of overlap or redundancy in the federal design precludes the event that the national or State government "will be able to enlarge its sphere of jurisdiction at the expence of the other." The Federalist, *supra*, No. 46 (James Madison) at 84.

> In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each, subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other; at the same time that each will be controlled by itself.

The Federalist, *supra*, No. 51 (James Madison) at 119-120.

In the early years of the Republic, no less an authority than Thomas Jefferson, in authoring the 1798 Kentucky Resolutions protesting the federal Alien and Sedition Acts, adverted to this very threat and how it was to be avoided:

> [T]he Constitution of the United States, having delegated to Congress the power to punish treason, counterfeiting the securities and current coin of the United States, piracies, and felonies committed on the high seas, and offences against the law of nations, and no other crimes whatsoever; and it being true as a general principle, and one of the amendments to the Constitution having also declared, that "the powers not delegated to the United States by the Constitution, nor prohibited by

> it to the States, are reserved to the States respectively, or to the people," therefore ... all their other acts which assume to create, define, and punish crimes, other than those so enumerated in the Constitution, are altogether void, and of no force; and that the power to create, define and punish such other crimes is reserved, and, of right, appertains solely and exclusively to the respective States, each within its own territory.

Kentucky Resolutions, 2d *Resolved* cl. (1798), *reprinted in* The Portable Thomas Jefferson 281, 282 (Merrill Peterson ed. 1979).

For long after the ratification of the Constitution, States defined and prosecuted nearly all criminal conduct. Federal law limited itself to "injury to or interference with the federal government itself or its programs. .... Except in those areas where federal jurisdiction was exclusive (the District of Columbia and the federal territories) federal law did not reach crimes against individuals. Crimes against individuals ... were the exclusive concern of the states." Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, 543 Annals Am Acad. Pol. & Sci. 39, 40 (1996). *See* 1 James Kent, Commentaries on American Law, *supra*, at 319 ("neither the constitution, nor the judicial acts founded upon it gave the federal courts a general jurisdiction in criminal cases").

Only in the late Nineteenth and the Twentieth Centuries did Congress begin to assert federal criminal jurisdiction over areas previously left to the States, and not without controversy. The growth in the federal fiscal ability by reason of both the modern American economy and the imposition of national income taxation has overwhelmingly reversed the relative balance between State and federal capabilities to address crime. And the nationalization of public opinion through modern communications media has given the federal government greater incentive and impetus to exercise its capability.

Yet the constitutional principle remains unchanged, that "preventing and dealing with crime is much more the business of

the States than it is of the Federal Government." *Patterson v. New York*, 432 U.S. 197, 201 (1977). There is an "historical American principle that the general police power lies with the states and not with the federal government, although there clearly is an appropriate sphere for federal criminal legislation." American Bar Association, Criminal Justice Section Task Force on Federalization of Criminal Law, The Federalization of Criminal Law 25 (1998) [hereinafter ABA Report]. *See also* The Federalist No. 14 (James Madison), *supra*, at 82 -83 ("it is to be remembered, that the general government is not to be charged with the whole power of making and administering laws. Its jurisdiction is limited to certain enumerated objects .... The subordinate governments ... will retain their due authority and activity.").

The threat remains in the present day trend to federalize growing areas of the criminal law. *See generally* William H. Rehnquist, *Address to the American Law Institute*, Remarks and Addresses at the 75th Annual ALI Meeting, May 1998, at 15-19 (1998); ABA Report 5-24. More than 40% of the federal criminal laws enacted since the Civil War have been enacted since 1970. ABA Report at 7. The 105th Congress alone considered approximately 1000 bills dealing with criminal statutes. *Id.* at 11 & n.15, App. C.

Federalization of criminal law harms our constitutional system even as it fails to live up to its promise of redressing crime. It diminishes the stature of the State courts in the eyes of their citizens. It "bestows new federal investigative power on federal agencies, broadening their power to intrude into individual lives." ABA Report at 27 ("Expanding, unreviewed federal power, when no strong case can be made for its existence, is contrary to the American wisdom against concentrating policing power in any one governmental entity."). Dual criminal systems can lead to disparate results for the same conduct, turning solely upon the forum in which the defendant may be tried. An increase in the volume and caseload of federal criminal cases reduces the separate and distinctive role of the federal courts, in addition to the obvious burden on their resources. *See* ABA Report 26-43.

"The principles of federalism and practical realities provide no justification for the duplication inherent in two criminal justice systems if they perform basically the same function in the same kind of cases." ABA Report at 55. VAWA, and Section 13981 in particular as it now comes before the Court, present a clear view of the path down which they inexorably lead. For if it makes no practical sense to have two duplicative systems of justice, and Congress explicitly premises the duplication, as VAWA is premised, on the bias and ineffectiveness of the State systems, then logic will sooner rather than later dictate the inevitable result: Congress will take it upon itself to legislate general crimes such as rape and spousal abuse, and replace the State courts.

The prior existence of the available State Common Law remedies, and their guarantee to the States by the Constitution, together suggest that the remedy devised by Congress in Section 13981 is accordingly neither necessary nor proper to the enforcement of the stated concerns in VAWA.

II. SECTION 13981 IS NOT A NECESSARY NOR PROPER MEANS OF ENFORCING THE FOURTEENTH AMENDMENT.

If there is a violation of the Fourteenth Amendment to be redressed by Congress, the Congress must logically direct its corrective towards those who commit the violation. Contrary to the Petitioner United States, *see* U.S. Brief at 47, a Fourteenth Amendment violation cannot occur without the involvement, however indirect, of a State or one acting under color of State law. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972). The United States implicitly concedes this point throughout its argument. *E.g.*, U.S. Brief at 38 ("Congress may ... ascertain ... whether and how often ... *government action* entails the indiscriminate imposition of inequalities"), 41 ("*state action* based on inaccurate stereotypes;" "*state actors'* failure to treat domestic violence as seriously as other violence;" "record documenting *the States'* failure to

respond"), 42 ("discrimination by *state officials and state employees*") (emphases added).

When Congress has acted under the Enforcement Clause of the Fourteenth Amendment to reach private actors, it has still been limited to those private actors acting in coordination with, or on behalf of, a State, or under color of State law. *E.g.,* 18 U.S.C. § 242; 42 U.S.C. § 1983; *see National Collegiate Athletic Ass'n v. Tarkanian,* 488 U.S. 179, 192 (1988) ("the question is whether the state was sufficiently involved to treat that decisive conduct as state action"); *see also Bray v. Alexandria Women's Health Center*, 506 U.S. 263 (1993); *Zinermon v. Burch,* 494 U.S. 113 (1990).

Section 13981 makes no such distinctions. Although the Section does reach those persons acting under color of State law, it does not stop there. The stated elements of a cause of action under the Section contain no requirement of State action or color of State law. 42 U.S.C.§ 13981(e). The stated elements comprise those elements already held to state causes of action in the Common Law for torts or criminal acts. *See, e.g.*, Restatement (Second) of Torts § 8A (1965). The only contribution of Section 13981 is the gender animus element, which is decidedly irrelevant to both Common Law and constitutional liability. Oliver W. Holmes, Jr., The Common Law 54 (1881) ("the intent necessarily accompanying the act ends there."); *Daniels v. Williams*, 474 U.S. at 329-30 (restating ruling of *Parratt v. Taylor*, 451 U.S. 527, 534-35 (1981), that Section 1983 "contains no state of mind requirement independent of that necessary to state a violation of the underlying constitutional right.").

Those State actors who do violate the Fourteenth Amendment already face liability under the existing provisions of the Reconstruction Civil Rights Acts, 42 U.S.C. §§ 1983, 1985, 1986. All other potential defendants under Section 13981 face a general tort liability, without a basis in the Fourteenth Amendment. This Court has "reject[ed] the contention that the Due Process Clause embraces such a tort law concept." *Daniels v. Williams*, 474 U.S. at 335-36. No reason exists for the Fourteenth

Amendment's Equal Protection Clause to differ in this respect. Section 13981 accordingly duplicates existing remedies against State actors, while fabricating constitutional liability against actors who are by definition incapable of committing the constitutional wrong. A member of neither group is a necessary or proper defendant.

III. INTERNATIONAL LAW DOES NOT COMPEL OR AUTHORIZE ENACTMENT OF SECTION 13981.

Amici curiae "International Law Scholars and Human Rights Experts" (hereinafter *Amici*), in their Brief supporting the Petitioners, state a novel yet incorrect view of the mandates of customary international law upon the United States. Their assertion, that customary international law and international treaties empower and authorize the Congress to enact Section 13981, fundamentally misapprehends the relationship between the United States Constitution and international law.

As a threshold matter, the question of international law's relation to VAWA and Section 13981 was not an issue on which this Court granted certiorari, and should therefore be dismissed. Supreme Ct. Rule 24.1(a) ("the brief may not raise additional questions or change the substance of the questions"); *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 97 n.4 (1991) (Court does not ordinarily address issues raised only by *amicus curiae*).

Secondly, the VAWA statute does not directly refer to any international law or treaties, as Congress explicitly detailed its purported grounds in the Constitution yet omitted to mention any other sources of authority. *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 119 S. Ct. 2199, 2208 n.7 (1999) ("Since Congress was so explicit about invoking its authority under Article I and ... under the Fourteenth Amendment, we think this omission precludes consideration of" other unstated grounds).

A. "International Law" Does Not Supersede the Constitution.

The only source of power and authority for the federal government is the People of the United States, acting through the Constitution. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 270 (1992) ("The United States is entirely a creature of the Constitution. Its power and authority have no other source.") (quoting *Reid v. Covert*, 354 U.S. 1, 5-6 (1957)); 494 U.S. at 277 (Kennedy, J., concurring) ("the Government may act only as the Constitution authorizes, whether the actions in question are foreign or domestic"). The federal government, and the Congress specifically, can only act in accordance with the enumerated powers or prohibitions chosen by the People, acting through the original Constitutional Convention or subsequent amendment according to the Constitution's terms.

Within the provisions of the Constitution, the federal government is given what has been called the "Treaty Power." The President is authorized to negotiate and enter into treaties. U.S. Const. art. II, § 2, cl. 2. Those treaties do not take effect unless and until the Senate shall grant its advice and consent by a two-thirds vote. *Id.* The Senate may, in consenting to a treaty, condition its advice and consent on reservations, which are specific interpretative comments qualifying the effect of the treaty or its provisions as to the United States.

This Senatorial procedure is a peculiarity of the United States Constitution, with which other countries sometimes have difficulty. While their unitary governments consider a treaty effectively ratified upon their accession to the treaty, the United States cannot be so bound until the Senate shall have done its part.

Once ratified and in effect, any treaty to which the United States is a party has the effect of federal law. U.S. Const. art. VI, cl. 2. But like any federal statute, it has no priority or precedence over the Constitution itself. The President and the Senate may no more alter the provisions of the Constitution by a treaty, than the Congress in both houses may alter the Constitution by regular

federal legislation. The sole manner for amendment of the Constitution lies in the procedures set forth in Article V. U.S. Const. art. V.

The "Treaty Power" therefore refers only to the power of the federal government to negotiate and enter into treaties that should govern the affairs of the United States as a sovereign actor among nations. It does not confer upon the government an extra-constitutional source or method of deriving federal authority at home. *Contra* Brief of *Amici* at 29 ("it is impermissible to read the commerce Clause to invalidate and Act of Congress that advances our treaty and customary international commitments."). Neither the President nor the Congress can agree, by means of a treaty, to do anything that the Constitution forbids.

> [N]o agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution. .... The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or the Executive and the Senate combined.

Reid v. Covert, 354 U.S. 1, 16-17 (1957).

Against these background principles, the arguments of the *Amici* that customary international law in general, and the International Convention on Civil and Political Rights[6] ("ICCPR") in particular, mandate and authorize Section 13981 are simply not true.

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[6] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368.

B. Congress Cannot Rely on "International Law" as an Independent Source of Authority.

1. Customary international law, or the "Law of Nations" as the Framers termed it, U.S. Const. art. I, § 8, cl. 10, is a very narrow and limited body of principles universally accepted as so fundamental as to be the irreducible minimum of acceptable humane conduct. The Law of Nations acted then and today acts upon international states as entities, rather than individuals. 4 William Blackstone, Commentaries *68 ("offences against the law of nations can rarely be the object of the criminal law of any particular state. For offences to this law are principally incident to whole states or nations").

Customary international law applies to the conduct of nations only when a custom or rule among nations has become so widespread and accepted that it is not only commonly taken as law among nations, but it is in fact obeyed by nations out of a sense of legal obligation (*opinio juris*.)[7] The instances of customary international law are rare, and the burden is upon the party asserting that a rule is one of customary international law to prove that it has attained that status.[8]

Much of customary international law has been codified in various modern treaties and conventions.[9] Throughout most of history, customary international law dealt primarily with relations

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[7] *North Sea Continental Cases* (F.R.G. v. Den.), 1969 I.C.J. 3; Restatement 3d Foreign Relations § 102 comment c.

[8] *Case of the S.S. Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10.

[9] *E.g.,* Vienna Convention on the Law of Treaties, May 23, 1969, UN Doc. A/CONF. 39/27, Sen. Exec. Doc. L, 92d Cong. 1st Sess. 1971, 8 I.L.M. 679 (1969). Although *Amici* fail to mention it, *Amici* Brief at 4 n.2, the United States has not ratified the Vienna Convention, which accordingly is not U.S. law, even though it is the international standard most often cited.

between States and their governments, and had very little focus on individuals or their relationships to foreign governments. The few exceptions centered on universal peremptory norms against individual conduct considered to offend all civilized nations (*jus cogens*), such as piracy or slavery. The governing consideration for one government's actions towards the citizens or nationals of another State was (and to a large part remains) the ability and likelihood of that alien's State of nationality to exercise its diplomatic protection on his behalf.[10]

Customary international law, when determined by a court to exist, can provide the rule of decision in a case otherwise properly before that court. It is a special type of federal common law, subject to the precedence of the Constitution and federal statute. When, in the absence of contrary provision in the Constitution or federal law, there is a rule of customary international law applicable, federal courts will apply that rule of customary international law. *The Paquete Habana*, 175 U.S. 677, 700 (1900) ("where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations").

While a court should try to avoid reading a statute in conflict with accepted international law, the deference is not absolute, and it assuredly does not apply to the Constitution itself or its mandates. The continuing precedent of *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804) (Marshall, C.J.), is better read in full quotation of the relevant passage:

> It has also been observed that an *act of Congress* ought never to be construed to violate the law of nations if any other possible construction remains, and, consequently, can never be construed to violate

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[10] *Cf. Nottebohm Case* (Liech. v. Guat.), 1955 I.C.J. 4 (admissibility to international forum of claim on behalf of individual national); *Barcelona Traction Case* (Belg. v. Spain), 1970 I.C.J. 3 (same); *Mavromattis Palestine Concessions Case* (Greece v. Gr. Brit.), 1924 P.C.I.J. (ser. A) No. 2 (same).

> neutral rights, or to affect neutral commerce, further than is warranted by the law of nations *as understood in this country.*

6 U.S. at 64 (emphasis added). *Contra Amici* Brief at 28. Chief Justice Marshall chose therefore not to apply a federal law, criminalizing the sale of American-built ships for use in war, against an American-born defendant who claimed Danish citizenship while the United States held him still to be an American citizen. The Chief Justice thereby avoided international law questions of the rights of neutral citizens as affected by the attempted application of U.S. law to forfeit his ownership of the vessel. The case never raised the question of supremacy of the Constitution over federal statute or international law. *Contra Amici* Brief at 28.

Customary international law does not of itself compel nor empower Congress to act outside of the Constitution. With respect to other nations, as a coequal sovereign among nations the United States faces penalties of reputation rather than compulsion (short of war) if it fails to accede to other nations' views. *Brown v. United States,* 12 U.S. (8 Cranch) 110, 128 (1814) (Marshall, C.J.) (International "usage is a guide which the sovereign follows or abandons at his will. The rule, like other precepts of morality, of humanity, and even wisdom, is addressed to the judgment of the sovereign."). International law "cannot be disregarded by [the sovereign] without obloquy, yet it may be disregarded. ... It is not an immutable rule of law, but depends on political considerations which may continually vary." 175 U.S. at 715 (Fuller, C.J., dissenting) (quoting *Brown v. United States*, 12 U.S. at 128). *See* John Chipman Gray, The Nature and Sources of the Law 131 (1927) ("The sanction which makes them operative as between nations is not a physical sanction; it is the sanction arising form the opinion of civilized nations that the rules are right, and that civilized nations are morally bound to obey them").

Congress has the power, but does not have any constitutional obligation, to enact laws governing offenses against the Law of Nations. Absent a Congressional statute specifically

doing so, the Court need not reach out to decide such questions. *See Williams v. Armroyd,* 11 U.S. (7 Cranch) 423 (1813) (Marshall, C.J.) (Despite Congressional resolution decrying French admiralty court's seizure of American vessel as violative of Law of Nations, rule of comity left the Court powerless to look beyond the French court's decree without specific Act of Congress telling it to do so).

Nor can customary international law force a court to rule contrary to the dictates of the Constitution. "International law" is not a supranational source of law, nor does it exude any supremacy over United States law akin to the Constitution and federal law's supremacy over the law of the respective States. *Cf. Erie*, 304 U.S. at 79 (noting "fallacy"' in "the assumption that there is a 'transcendental body of law outside of any particular State but obligatory within it'"). In modern years, the growing tendency has been for scholars to grossly overuse the term "customary international law" to cloak the policy preferences of academics with a presumed authority they otherwise do not merit. *E.g.,* Restatement (Third) of Foreign Relations Law of the United States § 701, Reporter's Note at ¶7 (1987) (cited in *Amici* Brief at 28); *cf. Sun Oil Co. v. Wortman*, 486 U.S. at 728-29 ("long established and still subsisting choice-of-law practices that come to be thought, by modern scholars, unwise, do not thereby become unconstitutional.").

While courts do regularly seek to avoid conflict between their rulings and the instances they can find of truly customary international law, the restriction, if any, of international custom lies only upon their interpretation of the statute, and not in their interpretation of the Constitution.

2. Treaties similarly cannot trump the Constitution. A treaty has the status of any ordinary federal statute. It must be duly enacted and comply with the Constitution. *Reid v. Covert*, 354 U.S. 1 (1957). Where there is conflict between a treaty and another treaty or federal statute, the ordinary rules of statutory interpretation apply. These rules include the general disfavoring of repeals by implication, the precedence of the specific over the

general, and the priority of the later enacted statute, among others. *See Whitney v. Robertson*, 124 U.S. 190 (1888).

Amici neglect to tell the Court, that in its advice and consent to the ICCPR, the Senate enacted certain reservations to the treaty, which have the full force and effect of law. Most relevant for present purposes is the proviso that "Nothing in this covenant requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States." S. Res. of Advice and Consent to Ratification of the International Covenant on Civil and Political Rights, art. IV, 138 Cong. Rec. S4781 (1991) (enacted).

Furthermore, the Senate resolution made clear that the ICCPR was not self-executing. *Id.* art. III (1) ("the United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing."). The principles declared by Chief Justice Marshall still prevail in this area:

> A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infra-territorial; but it is carried into execution by the sovereign power of the respective parties to the instrument.
>
> .... [W]hen the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.

Foster & Elam v. Neilson, 27 U.S (2 Pet.) 253, 314 (1829) (Marshall, C.J.). Congress has not to date enacted legislation declared to be in furtherance and implementation of the ICCPR.

The ICCPR therefore has no legal effect upon individuals in the United States without a constitutionally enacted federal law specifically implementing the Covenant and its terms. Until such

time, it retains only the aspirational ideal of a nonbinding resolution. *See Fujii v. California*, 38 Cal. 2d 718, 724, 242 P.2d 617, 621-22 (1952) (United Nations Charter and the Universal Declaration of Human Rights have no compulsory effect in United States law without implementing legislation).[11] The ICCPR accordingly provides no basis for the Congressional enactment of VAWA or Section 13981.

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[11] *Amici* cite to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 23 I.L.M. 1027 (1984), *as modified*, 24 I.L.M. 535 (1985), S. Treaty Doc. 100-20, as an alternate basis of authorization for VAWA. *Amici* Brief at 13,24. The Torture Victims Protection Act, 18 U.S.C. § 2340, already exists as the specifically designated implementing legislation for that Convention, thereby precluding the assignment of that role to VAWA. To hold otherwise would mean that VAWA implicitly repealed 18 U.S.C. § 2340, which *Amici* presumably do not intend.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ANTONIO J. MORRISON, ET AL., RESPONDENTS

CHRISTY BRZONKALA, PETITIONER

v.

ANTONIO J. MORRISON, ET AL., RESPONDENTS

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF RITA GLUZMAN AS *AMICA CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether Congress's power "to regulate Commerce * * * among the several States" (U.S. Const. art. I, § 8, cl. 3), when interpreted in light of the independent constitutional restrictions on congressional power embodied in the Domestic Violence Clause (U.S. Const. art. IV, § 4), includes the authority to regulate "gender-motivated" violence within the States through the creation, under the Violence Against Women Act of 1994, 42 U.S.C. § 13981, of a new federal cause of action available to the victims of such violence.

2. Whether 42 U.S.C. § 13981 is a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment.

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INTEREST OF THE *AMICA CURIAE*

Rita Gluzman is a federal prisoner who was convicted, in April 1997, of violating one of the criminal proscriptions of the Violence Against Women Act ("VAWA"), 18 U.S.C. § 2261(a)(1), which makes it a crime to engage in "interstate domestic violence." See *United States* v. *Gluzman*, 953 F. Supp. 84 (S.D.N.Y. 1997), aff'd, 154 F.3d 49 (2d Cir. 1998), cert. denied, 119 S. Ct. 1257 (1999).[1] The new federal "interstate domestic violence" offense occurs when any "person" — man or woman — "travels across a State line * * * with the intent to injure, harass, or intimidate that person's spouse or intimate partner," and, "in the course of or as a result of such travel, intentionally commits a crime of violence and thereby causes bodily injury to such spouse or intimate partner." 18 U.S.C. § 2261(a)(1). Gluzman is currently serving a life sentence in federal prison on the basis of her VAWA conviction.

Because she was charged under VAWA rather than for the traditional state crime of homicide, Rita Gluzman is in a unique position to provide this Court with a fuller understanding of VAWA's operation and constitutional defects. *Amica*'s experience in challenging her conviction has brought to light important arguments and materials that are directly relevant to the proper resolution of the Commerce Clause issue before the Court. *Amica* has a strong interest in ensuring that VAWA be invalidated as beyond Congress's Commerce Clause power.

SUMMARY OF ARGUMENT

Under this Court's decision in *United States* v. *Lopez*, 514 U.S. 549 (1995), Congress's power to regulate interstate commerce does not include the power to regulate "gender-motivated" violence within the States. Accordingly, Section 13981 of the Violence Against Women Act ("VAWA") cannot be sustained as a proper exercise of Commerce Clause authority.

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[1] Pursuant to Supreme Court Rule 37, letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court. This brief was funded by Rita Gluzman and was written entirely by her counsel.

I. The Court should take this opportunity to recognize the structural limits on the Commerce Clause that are reflected in other provisions of the Constitution, including the Domestic Violence and Guarantee Clauses of Article IV, Section 4. Long overlooked by this Court, the Domestic Violence Clause in particular provides compelling structural evidence that the States retain primary authority to regulate violent crime within their borders and that Congress's power to regulate such conduct pursuant to the Commerce Clause is correspondingly limited. Recent scholarship has provided fresh insight into the importance of these structural limitations on the Commerce Clause.

II. Contrary to the suggestion of petitioners and their *amici*, VAWA does not represent the culmination of a painstaking, careful and exhaustive investigation by Congress conducted over many years. VAWA failed to win passage in either the House or the Senate in the 101st and 102d Congresses. In addition, as even Senator Biden admitted at the time, Section 13981 was enacted by the 103d Congress largely in response to the sensational, highly publicized murder of Nicole Brown Simpson. Significantly, that event spurred a number of States to take immediate legislative steps to combat domestic violence, even before VAWA was enacted, but there is no evidence that these developments did anything to slow Congress down. Finally, in enacting VAWA Congress ignored serious concerns expressed by the Department of Justice itself about the need for, and constitutionality of, the legislation. Under these circumstances, deference to Congress's "findings" would be especially inappropriate.

III. Section 13981 regulates activity — gender-motivated violence — that plainly is not commercial in nature. Here, as in *Lopez*, "neither the actors nor the conduct have a commercial character, and neither the purposes nor the design of the statute have an evident commercial nexus." *Lopez*, 514 U.S. at 580 (Kennedy, J., joined by O'Connor, J., concurring). Moreover, Section 13981 regulates in several areas of traditional state authority. As the Department of Justice explained in opposing VAWA in the 101st and 102d Congresses, VAWA regulates in the area of family and domestic relations law, which has always

been the responsibility of the States. And it duplicates state intentional tort law, which already regulates violent, injury-causing conduct by private actors. The Court should make clear, moreover,. that *Lopez*'s inquiry into whether the regulated activity is "commercial" in nature and a subject of traditional state authority is also relevant to legislation involving the "channels" and "instrumentalities" of interstate commerce. Unless the Court does so, the government will continue to evade *Lopez* in the lower courts by resort to overbroad interpretations of "channels" and "instrumentalities."

IV. The Court's resolution of the Commerce Clause issue in this case should be informed by two additional considerations that bear on the constitutional analysis. *First*, if Congress has the power under the Commerce Clause to regulate a subject matter, then (at least in the absence of structural limitations) it also has the power, under the Supremacy Clause, to *completely preempt* state authority in that area. *Hillsborough County* v. *Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985). Because the power to regulate includes the power to regulate exclusively, this Court should ask whether the Commerce Clause confers on Congress the power to regulate domestic violence and gender-motivated violence to the complete exclusion of the States. It obviously does not.

Second, Congress has very broad authority under the Spending Clause to address serious social problems that are beyond the reach of Congress's regulatory powers. Not only does Congress's power to spend extend well beyond the direct grants of legislative authority contained in Article I, but it is also subject to fewer restrictions imposed by other provisions of the Constitution (including the Domestic Violence Clause). See *South Dakota* v. *Dole*, 483 U.S. 203, 206-12 (1987). Accordingly, there is nothing to prevent Congress from offering the States substantial grants to combat gender-motivated or domestic violence, as indeed Congress has done in VAWA. Nor is Congress prohibited from offering compensation directly to victims of domestic or gender-motivated violence, if it does so through the spending power (by creating, for example, a national

fund for compensating crime victims). In short, Congress is fully capable of achieving the compensatory, remedial and symbolic objectives underlying Section 13981 without regulating the conduct of private individuals, encroaching on state authority, or further burdening the federal courts.

ARGUMENT

In recent decades, Congress has enthusiastically added to the burden of the federal courts by creating new causes of action and by federalizing a wide array of traditional state crimes. Calls for restraint or moderation by the Chief Justice of the United States, other members of the federal judiciary, and legal academics concerned about the future of the federal courts have invariably fallen on deaf ears, the casualty of political forces that impel Members of Congress and Presidents of both parties to demonstrate that they are "tough on crime" as well as the illusion that any serious social problem in this country must, of course, have a federal regulatory solution. Nowhere is the problem of overfederalization greater than in the area of violent crime, where the hydraulic pressure to take legislative action is fueled by round-the-clock television and other media coverage capable, in short order, of transforming a heinous or sensational local crime into yet another provision of Title 18 of the United States Code. This is an area, in short, where the so-called "political checks" of federalism have totally broken down.

The Violence Against Women Act, including the novel federal damages remedy for female and male victims of "gender-motivated" violence that is at issue in this case (42 U.S.C. § 13981), represents one of the latest chapters in this unfolding story. The statute creates several new crimes in the area of domestic relations (18 U.S.C. §§ 2261, 2262), an area long regarded as the exclusive province of state governments; a novel intentional-torts provision that regulates "gender-motivated" violence in the States and is duplicative of state tort law; and a variety of other measures aimed at combating, directly or indirectly, domestic violence and other violent crime within the States. Enacted before this Court's decision in *United States* v. *Lopez*, 514 U.S. 549 (1995), and spurred by the sensationalistic media coverage of the tragic murder of Nicole Brown Simpson, VAWA's intentional tort provision is premised upon a sweeping theory of Congress's authority "[t]o regulate Commerce * * * among the several States" (U.S. Const. art. I, § 8, cl. 3).

In *Lopez*, this Court set about the task of restoring some meaning to the limits on Congress's power to regulate interstate commerce under a Constitution of enumerated powers. VAWA, however, can be upheld as a valid exercise of Commerce Clause authority only by resort to legal theories that would permit the federal government to federalize *any* crime of violence and *any* intentional tort. This Court should take this opportunity to reaffirm *Lopez* and strengthen its jurisprudential foundations.

I. The Court Should Recognize The Structural Limitations On The Commerce Clause

In a recent scholarly article, Professor Jay Bybee has persuasively demonstrated that the Domestic Violence Clause of Article IV of the Constitution — a "[l]ong ignored" provision that represents the "one Clause in the Constitution that actually links Congress, the states, and the problem of local crime" — provides powerful evidence of the limits on Congress's power under the Commerce Clause to regulate violence within the States. Bybee, *Insuring Domestic Tranquility:* Lopez, *Federalization of Crime, and the Forgotten Role of the Domestic Violence Clause*, 66 GEO. WASH. L. REV. 1, 3-4 (1997). Other scholars, moreover, have shown through their recent work that additional limits on the Commerce Clause power are strongly suggested by the Guarantee Clause of Article IV. The Court should take the opportunity presented by this case to recognize this structural basis for *Lopez*'s holding and for the real limits imposed by the Constitution on Congress's ability under the Commerce Clause to federalize traditional state-law crimes of violence.

A. *The Domestic Violence Clause*. Article IV, Section 4, includes both the Domestic Violence Clause and the Guarantee Clause. It provides:

> The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; *and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence*.

U.S. Const. art. IV, § 4 (emphasis added). By its plain terms, the Domestic Violence Clause requires as a precondition to federal intervention a proper request from a State, made by the body most accountable to the people (the legislature) — unless the legislature "cannot be convened." The Clause thus represents at once a delegation of enumerated power to the federal government, an obligation placed on the federal government to intervene ("shall protect"), and a reservation of state authority over certain threats to the public order occurring within the States. Moreover, as we next explain, the text, history, and longstanding Executive Branch interpretation of the Domestic Violence Clause all demonstrate that the provision authorizes federal intervention to deal not only with uprisings and insurrections (such as Shays' Rebellion), but also with problems of pervasive violence within the States.

The language of the Domestic Violence Clause contrasts with the narrower wording of the Militia Clause of Article I, which confers on Congress the power "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress *Insurrections*, and repel Invasions." U.S. Const. art. I, § 8, cl. 15 (emphasis added).[2] As Professor Bybee has noted, the delegates to the Constitutional Convention, in drafting the Domestic Violence Clause, expressly "refused to substitute the term 'insurrections' for 'domestic violence,' a proposal that would have coupled the terms 'invasion' and 'insurrection' in the Domestic Violence Clause just as they are in the Militia Clause." Bybee, *supra*, 66 GEO. WASH. L. REV. at 34; see 2 THE RE-

[2] Congress has enacted several statutes to implement the Militia Clause, Domestic Violence Clause, and Guarantee Clause. See 10 U.S.C. §§ 331-333.

CORDS OF THE FEDERAL CONVENTION OF 1787, at 467 (M. Farrand ed., revised ed. 1966). Instead, they opted for the broader term "domestic Violence."

The plain meaning of the phrase "domestic Violence" is exceedingly broad. In 1787, as today, the adjective "domestic" could mean either (1) "of one's own country" or "internal" (in contradistinction to "foreign"), or (2) "having to do with the home" or family. See WEBSTER'S NEW WORLD DICTIONARY 405 (3d College ed. 1988); S. JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1755) (Times Books 1983). Read in context, of course, it is the former meaning that was intended. Equally broad is the expansive term "Violence," which encompasses a wide range of human activities, many of which are traditionally the subject of criminal proscriptions under state law. "Domestic violence," in short, meant violence within the States.[3]

Not surprisingly, early commentators found in the broad language of the Domestic Violence Clause an important guarantee of state prerogatives. William Rawle, for example, wrote that the Clause was not limited to situations involving "violent efforts of a party to alter [a state's] constitution":

> If from any other motives, or under any other pretexts, the internal peace and order of the state are disturbed, and its own powers are insufficient to suppress the commotion, it becomes the duty of its proper government to apply to the

[3] The debates during the Convention over the Guarantee and Domestic Violence Clauses confirm that "domestic Violence" had a much broader meaning than "insurrection." See, *e.g.*, 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra*, at 47 (Wilson) (stating that "[t]he object" of the Guarantee Clause "is merely to secure the States agst. *dangerous commotions*, insurrections, and rebellions") (emphasis added); *ibid.* (Randolph) (explaining the provision had two different objects: "1. to secure Republican government. 2. to suppress domestic *commotions*") (emphasis added).

> Union for protection. * * * At the same time it is properly provided, in order that such interference may not wantonly or arbitrarily take place, that it shall only be on the request of the state authorities: otherwise the self-government of the state might be encroached upon at the pleasure of the Union * * * .

W. RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 299 (2d ed. 1829).

Similarly, Joseph Story explained that, as a consequence of the Domestic Violence Clause,

> every pretext for intermeddling with the domestic concerns of any state, under color of protecting it against domestic violence, is taken away by that part of the provision, which renders an application from the legislature, or executive authority of the state endangered necessary to be made to the general government, before its interference can be at all proper.

3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES ¶ 1819, at 684-85 (Fred B. Rothman & Co. 1991) (1833 ed.) (citing ST. G. TUCKER, I BLACKSTONE'S COMMENTARIES App. 367 (1803)). Thomas Cooley held the same view of the clause as Story. See T. COOLEY, GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 198 (Boston, Little Brown & Co., 1880) (also citing ST. G. TUCKER). For these early commentators, "'domestic violence' referred not only to insurrection, but also to other crimes as well. * * * [It] covered not only direct threats to the government's authority, but actions that indirectly threatened the government by challenging its ability to protect its citizens." Bybee, *supra*, 66 GEO. WASH. L. REV. at 39 (footnote omitted).

The Executive Branch has long given effect to the broad meaning of the term "domestic Violence" in Article IV of the Constitution. As early as 1857, for example, Attorney General Cushing explained that the term encompasses "robbery, burglary, arson, rape, and murder, by wholesale." *Yazoo City*

Post Office Case, 8 Op. Atty Gen. 489, 1857 U.S. AG LEXIS 55, at *10-11 (1857). More recently, the Justice Department has explained that "it is not necessary that there be political overtones or actual attempts to overthrow government in order to invoke Federal authority; a riot can, for example, form the basis for Federal intervention with military forces." U.S. DEP'T. OF JUSTICE, THE USE OF MILITARY FORCE UNDER FEDERAL LAW TO DEAL WITH CIVIL DISORDERS AND DOMESTIC VIOLENCE 2 (1980). "Presidents have honored requests in varied situations of violence that extended well beyond 'insurrection' in the narrow sense of a political uprising." *Id.* at 4.[4]

Regardless of the precise scope of the Domestic Violence Clause, and whether it would cover a situation where (as petitioners claim existed prior to VAWA's passage) state institutions have failed to protect citizens against widespread violence of a particular kind (*i.e.*, gender-motivated violence), the Clause provides compelling structural evidence of "the primacy of the states in addressing domestic violence within their borders." Bybee, *supra*, 66 GEO. WASH. L. REV. at 4. It also serves as a "reaffirmation of the enumerated powers doctrine and a promise of federal nonintervention that prohibits not only the uninvited use of federal forces to combat crime, but also forbids *federal legislation* that displaces the states' obligation to protect their citizens by suppressing domestic violence." *Ibid.* (emphasis added) (footnote omitted); see also *id.* at 5 (Domestic Violence Clause "provides a guarantee to the states that the federal government will not interfere with a state's administration over crime" and covers "not only to the use of federal troops, but also * * * federal legislation that threatens to

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[4] For a catalogue of incidents in which federal involvement in domestic disturbances has been sought or obtained, see F. WILSON, U.S. ARMY, FEDERAL AID IN DOMESTIC DISTURBANCES, 1787-1903, S. Doc. 57-209 (1903); OFFICE OF THE JUDGE ADVOCATE GENERAL, FEDERAL AID IN DOMESTIC DISTURBANCES, 1903-1922, S. Doc. 67-263 (1923) (supplementing F. WILSON, *supra*). See also B. RICH, THE PRESIDENTS AND CIVIL DISORDER (1941).

displace or co-opt the states' responsibility against domestic violence").[5] "The Domestic Violence Clause" in short, "plays the role of a Tenth Amendment for crime." *Id.* at 4. Cf. *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 514 (1996) (Twenty-first Amendment "delegated to the several States the power to prohibit commerce in, or the use of, alcoholic beverages").[6]

The Executive Branch has acknowledged the critical role played by the Domestic Violence Clause in ensuring the proper allocation of authority between state and federal governments (U.S. DEP'T. OF JUSTICE, *supra*, at 1):

> Under the Constitution and laws of the United States, the protection of life and property and the maintenance of public order are primarily the responsibilities of state and local governments, which have the necessary authority to enforce the laws. The Federal government may assume this responsibility and this authority only in certain limited instances.

B. *The Guarantee Clause*. Recent scholarship has also suggested that the Guarantee Clause "implies a modest restraint on federal power to interfere with state autonomy," because the

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[5] Because the Domestic Violence Clause applies to "[t]he United States," it obviously covers action by all three branches of the federal government.

[6] This Court has long recognized the limits on Congress's — and the federal courts' — power to regulate violent crime within the states. See, *e.g.*, *United States* v. *Cruikshank*, 92 U.S. 542, 553-54 (1875) ("It is no more * * * within the power of the United States to punish for a conspiracy to * * * murder within a State, than it would be to punish for * * * murder itself."); *Cohens* v. *Virginia*, 19 U.S. 264, 426 (1821) ("Congress has a right to punish murder in a fort, or other place within its exclusive jurisdiction; but no general right to punish murder committed within any of the States"); *United States* v. *Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812) (federal courts lack power to create common law crimes).

"states cannot enjoy republican governments unless they retain sufficient autonomy to establish and maintain their own forms of government." Merritt, *The Guarantee Clause And State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 2 (1988). In like manner, Professor Tribe has argued that the Guarantee Clause's text "provides a compelling justification for the Court to use Article IV as a basis for marking the outer limits and inviolate spheres of state autonomy." 1 L. TRIBE, AMERICAN CONSTITUTIONAL LAW, at 910 (3d ed. 2000). He explains (*ibid.* (emphasis in original)):

> Enforcement of the Guarantee Clause would ensure that Congress would be unable to deny the states *some* symbolic corollaries of independent status; *some* revenue with which to operate; *some* sphere of autonomous lawmaking, law-enforcing, and dispute-resolving competence; and *some* measure of choice in selecting a political and administrative structure.

Under that reading, the Guarantee Clause might well prevent the federal government from passing a comprehensive national criminal code, family and domestic relations statute, or education law, especially if such statute displaced *all* state authority. Put differently, it is difficult to see how the States could continue to function in a republican form of government if they are completely or largely divested of power over traditional areas of authority such as criminal law. Cf. *New York* v. *United States*, 505 U.S. 144, 185 (1992) (federal statutory provisions could not "reasonably be said to deny any State a republican form of government" because "[t]he states * * * retain the ability to set their legislative agendas" and "state government officials remain accountable to the local electorate").[7]

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[7] *Luther* v. *Borden*, 48 U.S. (7 How.) 1 (1849), does not require this Court to ignore the structural evidence contained in the text of the Domestic Violence and Guarantee Clauses in assessing the scope of Congress's authority under the Commerce Clause. In *Luther*, the Court refused to decide, in the wake of Dorr's Rebellion, which of two rival governments was the legitimate government of Rhode

C. *The Relevance Of Structural Evidence*. The Court has not hesitated to rely on structural evidence in interpreting the scope of Congress's enumerated powers. For example, in *Railway Labor Executives' Ass'n* v. *Gibbons*, 455 U.S. 457 (1982), the Court invalidated the Rock Island Railroad Transition and Employee Assistance Act ("RITA") on the ground that the law targeted a single bankrupt railroad and thus violated the "uniformity clause" of the Bankruptcy Clause. U.S. Const. art. I, § 8, cl. 4 (granting Congress the power to "establish * * * uniform Laws on the subject of Bankruptcies throughout the United States"). The Court rejected the notion that Congress could avoid this limitation in the Bankruptcy Clause by resorting to the Commerce Clause. "[I]f we were to hold that Congress had the power to enact nonuniform bankruptcy laws pursuant to the Commerce Clause," the Court explained, "we would eradicate from the Constitution a limitation on the power of Congress to enact bankruptcy laws." 455 U.S. at 468-69.

The same is true here. Congress lacks the power to pass laws under the Commerce Clause that circumvent limitations on federal authority in the Domestic Violence (and Guarantee) Clauses. More importantly for present purposes, the Domestic Violence Clause supplies "independent reinforcement for the step the Court took in *Lopez* to rein in congressional attempts to

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Island, explaining that the issue was nonjusticiable because "it rests with Congress to decide what government is the established one in a State." *Id.* at 42. Similarly, the Court stated that "[i]t rested with Congress" to "determine upon the means proper to be adopted" to carry out or implement the Domestic Violence Clause. *Ibid.* As this Court made clear in *New York* v. *United States*, however, *Luther* does not stand for the proposition that *all* claims under the Guarantee Clause are nonjusticiable. 505 U.S. at 183-86. See also 1 L. TRIBE, *supra*, at 911-12 & n.34. And, in any event, even if the Guarantee and Domestic Violence Clauses do not confer judicially enforceable rights upon individuals, it does not follow that the clauses cannot be enforced by the States or taken into account by this Court in interpreting other provisions of the Constitution.

federalize crime and may even justify closer scrutiny of such legislation." Bybee, *supra*, 66 GEO. WASH. L. REV. at 5. Because the Domestic Violence Clause directly addresses the respective roles of the state and federal governments in dealing with violence within the States, it provides strong textual support for this Court's skepticism, in *Lopez*, concerning congressional attempts to regulate violence within the States under the Commerce Clause.

D. *The Benefits Of Relying On Structural Evidence*. If the Court were to make clear in this case that the Domestic Violence Clause imposes limits on Congress's authority under the Commerce Clause to regulate violent crime within the States, this would have the salutary effect of reining in Congress's continuing efforts to federalize traditional state-law crimes.

"Since the 1970s, Congress has vastly increased the federal government's jurisdiction over crime," largely by "criminaliz[ing] a variety of activities traditionally considered to be purely state matters." Hollon, *After the Federalization Binge: A Civil Liberties Hangover*, 31 HARV. C.R.-C.L. L. REV. 499, 499 (1996); AMERICAN BAR ASS'N, TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, THE FEDERALIZATION OF CRIMINAL LAW 7 (1998) ("ABA REPORT") ("More than 40% of the federal criminal provisions enacted since the Civil War have been enacted since 1970.") (emphasis omitted). Even before Congress enacted the 1994 Crime Bill — which included VAWA's crime of "interstate domestic violence" and many other newly minted federal offenses, there were well in excess of 3,000 federal criminal laws on the books. ABA REPORT, at 94.[8]

Some of these new federal crimes have been created in

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[8] The list of activities that Congress has seen fit to punish as federal offenses today includes the physical disruption of a zoo, circus, or rodeo by a person who travels across a state line, 18 U.S.C. § 43; the interstate transportation of water hyacinths, *id.* § 46; and the transportation across state lines of dentures without the permission of a local dentist, *id.* § 1821.

response to a single, sensational event that received widespread publicity. See ABA REPORT, at 11-12.[9] Others, of which the provision involved in this case may well be an example, appear to be well-intentioned but largely symbolic (if VAWA's architect, Senator Biden, is to be believed). See Letter of Bruce Navarro, Deputy Assistant Attorney General, Department of Justice, to Chairman Joseph Biden, Jr., at 6 n.2 (Oct. 1990) ("1990 DoJ Letter") (quoting the following statement of Sen. Biden: "I hear commentators on television * * * saying, 'Well, will this stop violence against women * * * ?' The answer is no. That is not my intention. My intention * * * is to change the nation's attitude.").[10] See also J. JACOBS & K. POTTER, HATE CRIMES: CRIMINAL LAW AND IDENTITY POLITICS 65 (1998) (noting "proliferation of hate crime laws in the 1980s and 1990s" and arguing that such laws "are symbolic statements requested by advocacy groups for material and symbolic reasons and provided by politicians for political reasons").

Needless to say, the widening gyre of federal criminal

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[9] Examples include the Lindbergh Kidnaping Act, 18 U.S.C. § 1201, and the federal carjacking statute, *id.* § 2119. See Bonner, *The Federalization of Crime: Too Much of a Good Thing?*, 32 U. RICH. L. REV. 905, 915 (1998) (carjacking statute was enacted "partially, if not wholly, in response to a single particularly grizzly incident of carjacking": the abduction of Pamela Basu and her daughter in suburban Maryland in 1992); *id.* at 917 ("[T]he fact that the perpetrators of the Basu incident were tried, convicted, and sentenced to life in prison by state prosecutors in a state court raises questions about the need for a new federal carjacking solution in the first place.").

[10] Deputy Assistant Attorney General Navarro's letter was the first of two Justice Department letters sent to Chairman Biden expressing serious concerns about the need for, and constitutionality of, VAWA. Neither letter is mentioned in Senator Biden's *amicus* brief or in the Solicitor General's brief. To our knowledge, neither letter was included by Senator Biden in the legislative record. For the Court's convenience, we have lodged 12 copies of both letters with the Clerk.

jurisdiction has had a major impact on the federal courts' workload. Between 1980 and 1998, the number of criminal cases filed in the federal courts rose from 27,968 to 57,691. Mengler, *The Sad Refrain of Tough on Crime: Some Thoughts on Saving The Federal Judiciary From The Federalization of State Crime*, 43 U. KAN. L. REV. 503, 505 (1995); Rehnquist, *The 1998 Year-End Report on the Federal Judiciary*, at 13 n.2 (1999).

Various Members of this Court have long urged Congress to exercise greater restraint in the creation of new federal offenses. See, *e.g.*, *Chief Justice's 1991 Year-End Report on the Federal Judiciary*, 24 THE THIRD BRANCH, at 2 (1992) (describing the "serious" impact of "the caseload crisis on the federal courts"). Most recently, the Chief Justice warned (*1998 Year-End Report*, *supra*, at 4):

> The pressure in Congress to appear responsive to every highly publicized societal ill or sensational crime needs to be balanced with an inquiry into whether states are doing an adequate job in these particular areas * * * . Federal courts were not created to adjudicate local crimes, no matter how sensational or heinous the crimes may be. State courts do, and can, and should handle such problems.

Every plea from the judiciary for greater restraint has fallen on deaf ears in the halls of Congress. This is plainly an area where the political checks of federalism have completely broken down. Miner, *Federal Court Reform Should Start At The Top*, 77 JUDICATURE 104, 105 (1993). Even after *Lopez*, Congress has continued to expand the catalogue of federal crimes. See ABA REPORT, at 92-93 n.3 (citing numerous crimes created in 1997-98); *id.* at 11 ("An estimated 1,000 bills dealing with criminal statutes were introduced in the most recent Congress.") (footnote omitted). Fortunately, the Constitution supplies an antidote to this serious problem of overfederalization: the structural limitations on the Commerce Clause that have previously gone unrecognized and unenforced. Those limitations strongly suggest that Congress lacks the authority, under the Commerce Clause, to federalize traditional, state-law crimes that

target violence within the States.

II. VAWA Provides A Compelling Illustration Of The Need To Enforce The Constitution's Structural Limitations On The Commerce Clause

In urging this Court to uphold Section 13981 of VAWA as a valid exercise of Congress's power to regulate interstate commerce and to enforce the Fourteenth Amendment, petitioners and their supporting *amici* place substantial emphasis on the existence of legislative findings. See Brief of Petitioner Brzonkala ("Brzonkala Br.") 20, 26-29, 42-48; U.S. Br. 17, 22-23, 29-30, 38. They also seek to portray the statute as the culmination of a painstaking, careful and exhaustive investigation by Congress. See, *e.g.*, U.S. Br. 17, 23 (Congress's findings "arrived at * * * after four years of study"); *id.* at 38 (urging deference because of Congress's "unique institutional capacity to gather information on a comprehensive basis"); Brief of Senator Biden As *Amicus Curiae* ("Biden Br.") 1-2 (suggesting that "Congress" conducted a "four-year investigation" which resulted in a "massive legislative record"). As we next explain, this picture bears little relationship to reality.

A. The Failure To Enact The Violence Against Women Act In The 101st And 102d Congresses

1. *The 101st Congress*. On June 19, 1990, Senator Biden introduced S. 2754, the Violence Against Women Act of 1990. S. Rep. 545, 101st Cong., 2d Sess. 29 (1990). The Senate Judiciary Committee, which was chaired by Senator Biden, staged hearings on S. 2754 on June 20, August 29, and December 11, 1990. *Ibid.*; S. Rep. 138, 103d Cong., 1st Sess. 39 (1993) ("S. Rep. 138"). On October 4, 1990, Senator Biden offered a substitute bill for S. 2754 during an executive business meeting, and the Judiciary Committee reported the bill favorably by a voice vote. S. Rep. 138, *supra*, at 39. "No other action was taken on the bill prior to the end of the 101st Congress." *Ibid.* Thus, VAWA failed to pass either the Senate or the House in the 101st Congress.

As explained above (see note 10, *supra*), during the 101st Congress the Department of Justice sent a letter to Senator Biden expressing "serious concerns" about S. 2754, including the bill's proposed "damages remedy for crimes of violence motivated by the victim's gender." See 1990 DoJ Letter, *supra*, at 1, 6-8. "[W]e cannot support the creation of a duplicative federal damage remedy," Deputy Assistant Attorney General Bruce Navarro explained, "particularly without a showing that current state remedies are inadequate." *Id.* at 6. The Department outlined several reasons to doubt the need for, and effectiveness of, the proposed damages remedy:

> First, * * * [p]roviding a federal cause of action against the rapist, who will frequently be judgment-proof, is not likely to be an effective deterrent, as you candidly acknowledged in the statement you released at a June 20 hearing you held on this subject.
>
> Second, in those cases where damages could be recovered, the new federal remedy provides little that is unavailable through existing state remedies. We are unaware of any state that lacks a cause of action for the intentional tort of battery, nor have we heard that many women have encountered problems in recovering punitive damages against the offender under state law.

Ibid. (emphasis in original) (footnote omitted).

The Department also expressed "serious concerns" about "the doubtful constitutional basis for the bill's cause of action insofar as it covers underlying acts that were not taken under color of state law." 1990 DoJ Letter, at 6. The Department elaborated:

> [W]e are unable to discern the authority for reaching purely private action. Unlike other civil rights legislation based on the commerce clause * * * or the Thirteenth Amendment * * *, either [of] which may constitutionally reach *certain* types of private conduct, this bill appears to be based upon the Fourteenth Amendment. But that amendment, by its

> plain terms and through consistent judicial interpretation, *reaches only state action*, and we have serious doubts that section 5 of the amendment supports legislation reaching the purely private conduct of a person who rapes or sexually assaults a woman, even if *Katzenbach v. Morgan*, 384 U.S. 641 (1966), is taken at face value.

Id. at 8 (emphasis added). Compare U.S. Br. 36-50.

The Justice Department also criticized S. 2754's proposed "creat[ion of] two new federal offenses relating to spousal abuse (interstate traveling to commit spousal abuse and interstate violation of protective orders)." 1990 DoJ Letter, at 4. "In our view," Deputy Assistant Attorney General Navarro explained,

> these two new offenses represent an enormous increase in federal law enforcement responsibility in a subject-matter area which has traditionally been one of the most decidedly local. *Family and domestic relations law, including its criminal aspects, has always been appropriately left to the states*, and we in the federal government should be most reluctant to federalize it.

Ibid. (emphasis added).[11]

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[11] The Justice Department also questioned the need for other aspects of S. 2754, including the bill's provisions encouraging "pro-arrest policies in cases of spousal or family violence," which the Department viewed as unnecessary in view of the broad advances in this area made at the state level:

> Forty states have made progress toward adopting pro-arrest policies and laws. Thirty states authorize policies officers to make an arrest for misdemeanor assault in domestic violence cases on the basis of probable cause alone, without having witnessed the assault or having an arrest warrant. Ten others have *mandated* arrest if probable cause exists. The trend is decidedly in the direction of pro-arrest policies; more than half of law enforcement agencies in cities with populations greater than 500,000 have such policies.

2. *The 102d Congress*. Senator Biden reintroduced VAWA in the 102d Congress as S.15. See H.R. Rep. 395, 103d Cong., 1st Sess. 28 (1993) ("H.R. Rep. 395"). Under Senator Biden's stewardship, the Judiciary Committee held a hearing on S. 15 on April 9, 1991. *Ibid.* After Senator Biden offered a modified version of S. 15, the bill was voted favorably out of committee by a voice vote on October 29, 1991. *Ibid.*; S. Rep. 197, 102d Cong., 1st Sess. 36 (1991). "No other action was taken on the bill prior to the end of the 102d Congress." S. Rep. 138, *supra*, at 39. VAWA failed to pass either the Senate or the House in the 102d Congress.

In connection with the April 9, 1991 Senate hearing, the Department of Justice sent Senator Biden a second letter reiterating its "serious concerns" about S. 15. See Letter of W. Lee Rawls, Assistant Attorney General, Department of Justice, to Chairman Joseph Biden, Jr. (April 9, 1991) ("1991 DoJ Letter"); see also note 10, *supra*. Referring to the damages remedy for gender-motivated violence, the Department stated:

> This title, which in a nutshell creates a federal damage remedy for rape, no matter who the offender or what the circumstances, is a minimally modified version of title III of S. 2754, on which we provided extensive comments in our letter on that bill last year. Since the concerns we expressed were not taken into account in S. 15, our views remain exactly the same.

1991 DoJ Letter, at 14; see also *id.* at 16-17 (bill would have the effect of "taking these tort claims out of the state courts, where they have been for two centuries, and putting them in the federal courts"). With regard to VAWA's new federal domestic relations crimes, the Department reiterated its concern that "family and domestic relations law is fundamentally local in nature, and we question the wisdom of federalizing it." *Id.* at 9.

1990 DoJ Letter, at 5 (emphasis in original). As enacted, VAWA included the post-arrest provisions that the Justice Department, in 1990, thought were unnecessary. See 42 U.S.C. § 3796hh.

The issue of overfederalization also came up in the House of Representatives during the 102d Congress. H.R. 1502, a House bill similar to S.15, was reported favorably by the Subcommittee on Crime and Criminal Justice during the 102d Congress. H.R. Rep. 395, *supra*, at 28. At a hearing before that subcommittee, Senator Biden appeared as a witness and urged enactment of H.R. 1502. *Violence Against Women: Hearing Before the Subcommittee on Crime and Criminal Justice of the House Committee on the Judiciary*, 102d Cong., 2d Sess. 7-12 (Feb. 6, 1992). Addressing concerns raised by Chief Justice Rehnquist about the bill's expansion of the workload of the federal courts, Senator Biden stated:

> We have got a Chief Justice who, I respectfully suggest, does not know what he is talking about, when he criticizes this legislation. What he is referring to is the one section of the bill that refers to making violence against women a hate crime * * * . * * * Now, the Chief Justice and others have suggested that the bill may burden the Federal courts unnecessarily. Let me tell you something. We have, under title [18] * * * , provisions making it a Federal crime if you move across a State line with falsely made dentures * * * [or] a cow * * * . * * * If we can take care of cows, maybe the vaulted [sic] chambers of the Supreme Court could understand it may make sense to worry about women * * *.

Id. at. 7-8. Thus, Senator Biden's rationale for why Congress should not be concerned about increasing the workload of the federal courts was because those courts had already been assigned responsibilities that were trivial or unimportant.

B. The Circumstances Surrounding Passage Of The Violence Against Women Act In The 103d Congress

On the first day of the 103d Congress, Senator Biden re-introduced VAWA in the form of S. 11, a modified version of the bill that had failed to win passage in the 102d Congress. S. Rep. 138, *supra*, at 40. Under Biden's stewardship, the Senate Judiciary Committee staged additional hearings on S. 11 in February, April, and November of 1993. See Biden Br. 2 n.3.

S. 11 was reported favorably out of the Judiciary Committee on November 17, 1993, and it was immediately added as an amendment to the pending crime bill, which was passed by the Senate. S. Rep. 138, *supra*, at 29; Biden Br. 3 n.4.

H.R. 1133, a bill similar to S. 11, was introduced in the House by Representative Pat Schroeder and others. H.R. Rep. 395, *supra*, at 28. On November 16, 1993, a House subcommittee conducted a hearing at which an organization of 57 chief justices of the States, territories, and the District of Columbia took the extraordinary step of publicly opposing H.R. 1133's creation of a federal cause of action for gender-motivated violence. See *Crimes of Violence Motivated By Gender: Hearing Before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary*, 103d Cong., 1st Sess. 77-84 (Nov. 16, 1993) (letter with attachments) ("*1993 House Hearings*"). Four days later, on November 20, H.R. 1133 was reported out of the House Judiciary Committee, but only after the Committee dropped the controversial damages provision from the bill. Biden Br. 3 n.5. The House passed H.R. 1133 in this form on the same day. See *id*. at 3 n.4. On April 14, 1994, the House again passed the Violence Against Women Act (without the damages provision) as part of the crime bill. *Ibid*.

Both chambers then appointed conferees to address the differences between the House and Senate crime bills. 140 Cong. Rec. S 6018, 6108 (May 19, 1994) (Senate agreed to House's request for a conference). The conferees met for the first time on June 16, 1994. 140 Cong. Rec. D 688 (June 16, 1994).

Three days before the Senate and House conferees' first meeting, an event occurred that would transfix the nation. As one commentator has succinctly explained:

> On June 13, 1994, a double murder in Southern California created more than a year's worth of sensational headlines and put the problem of domestic violence in the national spotlight. The bodies of Nicole Brown Simpson and Ronald Goldman were found stabbed to death outside Simpson's condominium. Several days later, police arrested Nicole

> Brown Simpson's ex-husband, football star O.J. Simpson, and charged him in the double murder. Almost immediately, the media revealed Simpson's history as an abusive husband. Recordings of a fearful Nicole Brown Simpson telephoning the emergency 9-1-1 center, relating her distress over an impending attack of her ex-husband, were broadcast across the world.

McKinley, *The Violence Against Women Act After* United States v. Lopez: *Will Domestic Violence Jurisdiction Be Returned to the States?*, 44 CLEV. ST. L. REV. 345, 345-46 (1996).

These sensational events had a profound impact on the political process, including in Congress. According to press accounts, during the initial meetings of the Senate and House conferees, VAWA was "imperiled partly by funding disagreements" (arising out of the House's desire to spend $700 million, much less than the $1.8 billion proposed by the Senate). *Lawmakers Push Domestic Violence Bill*, THE PHOENIX GAZETTE, June 29, 1994, at A7; accord Hohler, *Pressure Builds for Bill to Counter Domestic Violence*, BOSTON GLOBE, June 29, 1994, at 12. On June 22, 1994, however, a rally was held on Capitol Hill by supporters of VAWA who demanded that the bill be included in the pending crime bill. Edmonds, *A Call to Arms Against Spouse Abuse*, USA TODAY, June 23, 1994, at 3A. On June 28, Representative Patricia Schroeder and others, "[i]nvoking the name of Nicole Brown Simpson, * * * urged a panel of colleagues to loosen a legislative logjam and swiftly approve a sweeping bill aimed at curbing domestic violence." *Lawmakers Push Domestic Violence Bill*, *supra*, at A7.

On June 30, the same day that a hearing was held in the O.J. Simpson case, a series of events unfolded in Washington. President Clinton issued a letter condemning domestic violence as a national "crisis" and stating, in an apparent reference to Nicole Brown Simpson's 911 call, "We can no longer ignore the pleas of those in desperate need." Gordon, *Washington Focuses on Domestic Violence as Simpson Faces Evidence*, ASSOCIATED PRESS, June 30, 1994. In the House, a subcommittee convened

hearings on domestic violence even though VAWA was already in the hands of House and Senate conferees. See *Domestic Violence: Not Just A Family Matter: Hearing Before the Subcommittee on Crime and Criminal Justice of the House Committee on the Judiciary*, 103d Cong., 2d Sess. (June 30, 1994) ("*June 1994 Hearings*"). Following a grant of permission to the media to televise the proceedings, the hearing began with an explicit mention of the Simpson case and featured House members taking turns denouncing domestic violence, followed by the graphic testimony of five victims. See *id.* at 1-24.[12]

By mid-July of 1994, less than a month after Nicole Brown Simpson's murder, it could fairly be said that VAWA was "rocketing toward final passage, fueled largely by national publicity about O.J. Simpson's history of domestic abuse." Cummings, *Breaking Through*, ATLANTA CONSTITUTION, July 13, 1994, at A6. On July 13, press reports suggested that the conferees had reached general agreement on most of the crime bill, including an agreement to include the controversial damages provision relating to gender-motivated violence. *Ibid.* Senator Biden, who was a conferee for the Senate, confirmed this at a July 19, 1994 press conference. *Major Leader Special Transcript*, FEDERAL NEWS SERVICE, July 19, 1994, at 4.

Senator Biden himself candidly acknowledged the critical role played by the Simpson case in the conferees' ultimate decision to include the controversial damages provision:

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[12] At the hearing, Senator Biden criticized the House for omitting the civil damages provision that had been included in the Senate bill and elaborated on how that provision might have helped Nicole Brown Simpson. *June 1994 Hearings*, at 32 ("[T]here is the ability to say I will take the estate in Brentwood, thank you very much."); see also Bender, *Roth Shelves Principle, Votes for Spending Bill*, GANNETT NEWS SERVICE, July 1, 1994 ("[T]he death of one woman has reignited the fury over domestic violence. The fever-pitch coverage of the death of Nicole Brown Simpson will help the bill pass, Biden said. *'Now it's a stampede.'*") (emphasis added).

> Biden, a supporter of the Violence Against Women Act, conceded that the publicity surrounding O.J. Simpson's history of domestic violence played a major role in persuading House members to accept the toughest language on that provision. "I could assume that they realized I was right all along, but somehow I doubt that," the senator said.

Ibid.; see also Mehle, *Schroeder Calls Crime Bill Historic*, DENVER ROCKY MOUNTAIN NEWS, Aug. 22, 1994, at 3A ("'The whole violence against women acts is a very new focus . . . A lot of it might be attributed to the O.J. Simpson fallout.'") (quoting Rep. Schroeder).

Significantly, the Simpson case also catalyzed immediate action at the state level. As one newspaper reported only ten days after Nicole Brown Simpson's murder, "The public drumbeat is starting to spur action":

> States are rushing to toughen spousal abuse laws. In New York Tuesday, state legislators reached agreement on a bill that would require police to arrest suspected spouse-beaters. The New Jersey Assembly on Monday passed a package of six domestic violence bills drafted in the past year. Lawmakers in California are renewing a push for proposals to hold defendants in spousal abuse cases longer and set up a registry of restraining orders.

Edmonds, *supra*, at 3A; see also Armstrong, *Colorado Offers Answers on Domestic Violence*, CHRISTIAN SCIENCE MONITOR, July 19, 1994, at 3 (discussing developments in other states); *ibid.* ("Amid the klieg-light attention over the O.J. Simpson case, lawmakers from Washington D.C., to Washington State are revisiting whether to tighten domestic-abuse laws."). There is no evidence that these contemporaneous efforts by the States to address the problem of domestic violence, which obviously diminished the need for federal action, had any impact on the conferees in the month between Nicole Simpson's murder and the time the conferees reportedly agreed to include the VAWA damages provision.

As the foregoing account of VAWA's legislative history makes clear, it is simply not accurate to describe Congress's enactment of Section 13981 as the culmination of a careful, deliberate, thorough investigation conducted over four years. The bill failed to pass either chamber in the 101st Congress. It failed to pass either chamber in the 102d Congress. While both chambers of the 103d Congress finally passed the bill, the House version did not include the controversial damages provision at issue in this case. It was only when the news broke of a sensational crime that the conferees opted to include the damages provision from the Senate bill.

The primary impetus behind Section 13981's enactment, then, was all-too-familiar: a sensational public event that gripped the nation, dominated the media, and spurred Congress to take precipitous action. See also note 9, *supra*. Senator Biden himself all but admitted that this was what made the difference in Section 13981's acceptance by the conferees. Section 13981 was enacted, moreover, even though Nicole Brown Simpson's death also spurred *the States* to undertake immediate legislative reforms in the area of domestic violence. And it was enacted even though the Department of Justice had voiced concerns about the need for VAWA and its constitutionality. Finally, there is the dismissive treatment by Senator Biden of the Chief Justice's concerns about burdening the federal courts. All in all, Section 13981 provides a textbook illustration of why substantial deference to Congress's "judgments" about its authority to legislate under the Commerce Clause is unwarranted.[13]

III. VAWA Regulates Noncommercial Activity In An Area Of Traditional State Authority

A. In *United States* v. *Lopez*, 514 U.S. 549 (1995), this Court placed "enormous emphasis" on the "distinction between

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[13] See also 1 L. TRIBE, *supra*, at 818 n.47 ("A resourceful legislator (or legislative assistant) could likely compile an impressive array of materials connecting just about any activity to the national economy.").

regulation of commercial or economic activities and regulation of noncommercial, non-economic activities," as Judge Luttig's opinion ably demonstrates. *Brzonkala* v. *Virginia Polytechnic Inst. & State Univ.*, 169 F.3d 820, 832, 833 & n.5 (4th Cir.) (en banc), cert. granted, 68 U.S.L.W. 3177 (1999). That distinction, of course, flows directly from the text of the Commerce Clause, which confers on Congress the limited authority "[t]o regulate *Commerce* * * * among the several States." U.S. Const. art. I, § 8, cl. 3 (emphasis added). As Professor Tribe has correctly observed, this distinction does not suffer from the same flaws as the earlier lines this Court has drawn in attempting to delineate limits on the Commerce Clause:

> The problem with the pre-1937 doctrine was not so much that it attempted to define commerce — something one can hardly avoid when defining the power to *regulate* "commerce" — as that it did so in arbitrary ways, ways seemingly insensitive to economic realities. The pre-1937 Court made distinctions * * * between different *kinds of economic activity* (all of which seemed to involve "commerce" to the naked eye) without ever presenting a coherent explanation of *why* one kind of economic activity would be deemed "commerce" and another would not, * * * . The *Lopez* Court attempted to avoid * * * these * * * distinctions by settling on the seemingly more comprehensible and more readily defensible dichotomy between regulating, for whatever purpose, activity that is in *any* sense economic or commercial in nature, and regulating activity that plainly is not.

1 L. TRIBE, *supra*, at 822 (emphasis in original).

It is clear that the activity regulated by 42 U.S.C. § 13981 — violent criminal conduct that is motivated by gender — is not commercial in nature. Indeed, like the conduct at issue in *Lopez*, gender-motivated violence is activity in which "neither the actors nor the conduct have a commercial character, and neither the purposes nor the design of the statute have an evident commercial nexus." *Lopez*, 514 U.S. at 580 (Kennedy, J., joined by O'Connor, J., concurring). See *Brzonkala*, 169 F.3d at 834-36.

B. Section 13981 also regulates in several areas of traditional state authority. To begin with, the provision is clearly connected to state-law crimes of violence. Beyond that, it is duplicative of state intentional tort law. See Brief of the Association of American Trial Lawyers As *Amicus Curiae*, at 15 ("Virtually all violent conduct that inflicts or threatens physical harm to a person that would be punishable as a felony also constitutes an intentional tort under state law.").

Perhaps most importantly, it "is undisputed that a primary focus" of Section 13981 "is domestic violence, a type of violence that, perhaps more than any other, has traditionally been regulated not by Congress, but by the several States." *Brzonkala*, 169 F.3d at 842. Indeed, several of petitioners' *amici* underscore this point by suggesting that *most or all* domestic violence is actionable under Section 13981. See, *e.g.*, Brief of *Amici Curiae* AYUDA, Inc., *et al.*, at 8 ("As with domestic violence generally, domestic violence against immigrants is gender-specific.").

The "regulation of domestic relations * * * has long been regarded as a virtually exclusive province of the States." *Sosna* v. *Iowa*, 419 U.S. 393, 404 (1975). More than a century ago, this Court explained that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not the laws of the United States." *Ex parte Burrus*, 136 U.S. 586, 593-94 (1890). That principle has been "consistently recognized" in this Court's cases. *Rose* v. *Rose*, 481 U.S. 619, 625 (1987); see also *Thompson* v. *Thompson*, 484 U.S. 174, 186 n.4 (1988) (referring to "the longstanding tradition of reserving domestic relations matters to the States"); *Santosky* v. *Kramer*, 455 U.S. 745, 771 (1982) (dissent) ("[T]he Court has scrupulously refrained from interfering with state answers to domestic relations

questions.").[14]

As explained above (at 17-19), the Justice Department vigorously opposed the enactment of Section 13981 in the 101st and 102d Congresses on the ground that it was duplicative of state intentional tort law and intruded upon traditional state authority over "domestic relations." So great was VAWA's incursion on traditional state authority in this area that an organization of state chief justices took the extraordinary step of publicly opposing the legislation. See Conference of Chief Justices, Resolution X, reprinted in *1993 House Hearings, supra*, at 83. The state chief justices explained that "spousal and sexual violence and all legal issues involved in domestic relations historically have been governed by state criminal and civil law," and that "state courts have the primary responsibility for administering a coherent and comprehensive system of civil, criminal, and domestic relations law and have the structure, experience and procedures for the proper disposition of all cases within their systems." *Ibid.*

C. Because it is rooted in the text of the Commerce Clause, the critical distinction articulated in *Lopez* between commercial and non-commercial activities is also relevant to Commerce Clause cases involving both the "channels" and the "instrumentalities" of interstate commerce. Equally relevant in such cases is the concern over congressional intrusion into areas of traditional state authority. The contrary assumption of many

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[14] So deeply embedded is this principle that the federal courts have long recognized a "domestic relations" exception to diversity jurisdiction. *Ankenbrandt* v. *Richards*, 504 U.S. 689 (1992). See also *Thompson*, 484 U.S. at 186-87 (refusing to infer an implied right of action under the Parental Kidnaping Prevention Act of 1980, 28 U.S.C. § 1738A, because that would "entangle" the federal courts "in traditional state-law questions that they have little expertise to resolve"); *Lehman* v. *Lycoming County Children's Servs. Agency*, 458 U.S. 502, 511-12 (1982) (holding that "special solicitude for state interests" in area of family relations requires exclusion from federal habeas of challenges to child custody decisions).

lower courts, based on a misreading of this Court's decision in *Lopez*, has encouraged the government to argue for overbroad readings of "channels" and "instrumentalities" in order to evade scrutiny under *Lopez*. Unless this Court makes clear that these bedrock concepts, rooted in the text and structure of the Constitution, apply with equal force to all types of Commerce Clause cases, the Court's recent efforts to enforce the limits on the Commerce Clause will be easily circumvented.[15]

IV. Several Additional Factors Should Inform The Court's Commerce Clause Analysis In This Case

The Court's Commerce Clause cases have not always taken note of two very important considerations bearing on the constitutional inquiry, both of which support affirmance here.

First, in evaluating the extent of incursion by Congress into traditional areas of state authority as well as the logical implications of the government's theory of Commerce Clause power, the Court should take account of the fact that if Congress has the power under the Commerce Clause to regulate a subject matter, then it also has the power, under the Supremacy Clause, to *completely preempt* state authority in that area. *Hillsborough County* v. *Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985). In this case, for example, if Congress has the authority

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[15] For a detailed explanation of the problem of attempted governmental circumvention in the lower courts, of why the *Lopez* framework is important in certain cases involving the "channels" of interstate commerce (especially those in which Congress federalizes a traditional state crime merely by tacking on an element of interstate travel), and of why cases such as *Caminetti* v. *United States*, 242 U.S. 470 (1917), are not to the contrary, see Petition for a Writ of Certiorari, *Gluzman* v. *United States*, No. 98-1326, at 23-30. For a thorough examination of the Commerce Clause, including a persuasive argument for further refinements, see Nelson & Pushaw, *Rethinking The Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 IOWA L. REV. 1 (1999) (forthcoming).

under the Commerce Clause to enact Section 13981, it also possesses the power to displace entirely state intentional torts laws relating to the violent conduct of private individuals. It could also promulgate a national domestic relations law that would completely supplant state authority in this area. Such a role for the federal government, we submit, is unthinkable.

Second, in evaluating the consequences of ruling that Commerce Clause power does not exist in a particular case, this Court should bear in mind that the Commerce Clause is not the only basis for congressional action. Significantly, Congress has exceedingly broad authority to address social problems through the Spending Clause. See *South Dakota* v. *Dole*, 483 U.S. 203, 206-12 (1987) (Spending Clause power extends beyond direct grants of legislative authority and is not subject to limitation by other constitutional provisions in same manner). Thus, there is nothing to prevent Congress from offering the States substantial financial assistance in combating gender-motivated and domestic violence, as indeed Congress has done in VAWA. Moreover, Congress presumably could exercise its broad power under the Spending Clause to set up a national fund for compensating victims of gender-motivated violence, and thereby achieve exactly the same compensatory, remedial and symbolic objectives claimed for Section 13981 (without, however, either regulating the conduct of private actors or burdening the federal courts). Arguments about the baleful or catastrophic consequences of invaliding a congressional statute under the Commerce Clause are therefore usually grossly exaggerated if not entirely unfounded.[16]

CONCLUSION

The judgment should be affirmed.

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[16] *E.g.*, Biden Br. 4 (stating, incorrectly, that this case "tests whether Congress has power to address significant national problems that it has determined obstruct interstate commerce and threaten principles of equality").

Respectfully submitted.

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Nos. 99-5 and 99-29

IN THE

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v.

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CHRISTY BRZONKALA, PETITIONER

v.

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On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF AMICUS CURIAE THE CLAREMONT INSTITUTE CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the Fourth Circuit correctly held that Congress exceeded its constitutional authority under the Commerce Clause when it provided a civil remedy, complete with attorneys fees, for non-commercial violent conduct that involved neither a regulation of commerce nor activity whose regulation was necessary and proper to give effect to a regulation of commerce, but was instead conduct traditionally falling within the police powers reserved to the States?
2. Whether the Fourth Circuit correctly held that Congress exceeded its constitutional authority under Section 5 of the 14th Amendment when it provided a civil remedy, complete with attorneys fees, for violent conduct motivated by gender animus, when the states already protected against such conduct through criminal and tort law?

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BRIEF OF AMICUS CURIAE THE CLAREMONT INSTITUTE CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE[1]

The Claremont Institute for the Study of Statesmanship and Political Philosophy is a non-profit educational foundation whose stated mission is to "restore the principles of the American Founding to their rightful and preeminent authority in our national life," including the principles, at issue in this case, that We the People delegated to the national

[1]The Claremont Institute Center for Constitutional Jurisprudence files this brief with the consent of all parties. The letters granting consent are being filed concurrently. In accord with Rule 37.6, no counsel for a party has authored this brief in whole or in part, nor has anyone but *amicus curiae* and its members made a monetary contribution to the preparation and submission of this brief.

government only certain, specifically enumerated powers and that the bulk of sovereign power, including the police power at issue here, was reserved to the States or to the people.

The Institute pursues its mission through academic research, publications, scholarly conferences, and the selective appearance as amicus curiae in cases of constitutional significance. Of particular relevance here, the Institute has published extensively about the constitutional limitations on the powers delegated to the national government, including a book edited by Gordon Jones and Institute Senior Fellow John Marini entitled *The Imperial Congress: Crisis in the Separation of Powers*.

Recently, in order to further advance its mission, the Claremont Institute established an in-house public interest law firm, the Center for Constitutional Jurisprudence. The Center's purpose is to further the mission of the Claremont Institute through strategic litigation, including the filing of amicus curiae briefs in cases such as this that involve issues of constitutional significance going to the heart of the founding principles of this nation.

SUMMARY OF ARGUMENT

Over the past decade, this Court has reinvigorated the Founders' vision of a constitutional system based on a division of the people's sovereign powers between the national and state governments. In *New York* v. *United States*, 505 U.S. 144, 156-57 (1992), for example, the Court recognized that the principle of reserved powers underlying the Tenth Amendment serves as a barrier to the exercise of power by Congress. In *Printz* v. *United States*, 521 U.S. 898, 923-24 (1997), the Court recognized that the principle was grounded not so much in the text of the Tenth Amendment but in the word "proper" of the Necessary and Proper clause, as informed by the overall structure of the Constitution and the numerous clauses that recognize the retention of

sovereign powers by the States. This same idea of state sovereignty has been given voice in the parallel cases arising under the Eleventh Amendment: *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44 (1996); *Alden* v. *Maine*, 119 S.Ct. 2240 (1999); *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S.Ct. 2219 (1999); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 119 S.Ct. 2199 (1999).

Yet for the Founders, the division of sovereign powers was not designed simply or even primarily to insulate the states from federal power. It was designed so that the states might serve as an independent check on the federal government, preventing it from expanding its powers against ordinary citizens. *United States* v. *Lopez*, 514 U.S. 549, 552, 582 (1995). And it was designed so that decisions affecting the day-to-day activities of ordinary citizens would continue to be made at a level of government close enough to the people so as to be truly subject to the people's control. *See Gregory* v. *Ashcroft*, 501 U.S. 452, 458 (1991). The Tenth and Eleventh amendments are simply examples of what the Founders accomplished principally through the main body of the Constitution itself. Congress was delegated only specifically enumerated powers (and the necessary means of giving effect to those powers) over subjects of truly national concern; it was not given a general police power to control the ordinary, local activities of the citizenry.

In enacting the Violence Against Women Act of 1994, Pub. L. No. 103-322, §§ 40001-40703, 108 Stat. 1796, 1902-55, Congress purportedly acted pursuant to its Article I, Section 8 power "to regulate commerce . . . among the States" and/or its power under Section 5 of the 14th Amendment to insure that no State denied its citizens the equal protection of the laws. Neither of these powers is broad enough to support the enactment by Congress of the provision at issue here, which creates a private right of action against any person "who commits a crime of violence

motivated by gender." 42 U.S.C. § 13981 ("VAWA"). The VAWA is not a regulation of commerce, and it is not a law that gives effect to some regulation of commerce (much less a "necessary" and "proper" one). To construe the commerce clause as broadly as did Congress when it enacted the VAWA and as does the Executive branch in its arguments before this Court, is to render meaningless the primary check on federal power envisioned by the founders—the doctrine of limited, enumerated powers. Moreover, by essentially rendering superfluous the tort law of all 50 states (and, if the principle be taken to its next logical step, the criminal law as well), Congress has here intruded upon the powers reserved to the States in a way that makes the intrusions at issue in *New York* v. *United States* and *Seminole Tribe* look like child's play.

Nor does the 14th Amendment afford to Congress the powers it has claimed here. By this statute, Congress has authorized a civil suit against private citizens, not against the state governments whose supposed denials of equal protection are the putative basis for the exercise of power here. Even if such a remedy might be permissible in some circumstances, it cannot be permissible when there is no underlying violation by the State. Petitioners' argument that there is such a violation amounts to what is essentially a "comparable worth of crimes" analysis, an analysis that has been rejected by the courts in analogous contexts and that finds no support in this Court's 14th Amendment jurisprudence.

In sum, neither the Commerce Clause nor Section 5 of the 14th Amendment provide a constitutional basis for the VAWA; the well-reasoned decision of the Fourth Circuit invalidating that statutory provision should therefore be affirmed.

ARGUMENT

I. IN ENACTING THE VAWA, CONGRESS HAS REJECTED THE PRINCIPLE OF ENUMERATED POWERS, A PRINCIPLE WHICH THE FOUNDERS BELIEVED TO BE ESSENTIAL TO LIBERTY.

When the framers of our Constitution met in Philadelphia in 1787, it was widely acknowledged that a stronger national government than existed under the Articles of Confederation was necessary if the new government of the United States was going to survive. The Continental Congress could not honor its commitments under the Treaty of Paris; it could not meet its financial obligations; it could not counteract the crippling trade barriers that were being enacted by the several states against each other; and it could not even insure that its citizens, especially those living on the western frontier, were secure in their lives and property. *See*, *e.g.*, Letter from Tench Coxe to the Virginia Commissioners at Annappolis (Sept. 13, 1786), *reprinted in* 3 THE FOUNDERS' CONSTITUTION 473-74 (P. Kurland & R. Lerner eds., 1987) (noting that duties imposed by the states upon each other were "as great in many instances as those imposed on foreign Articles"); THE FEDERALIST NO. 22, at 144-45 (Alexander Hamilton) (C. Rossiter & C. Kesler eds., 1999) (referring to "[t]he interfering and unneighborly regulations in some States," which were "serious sources of animosity and discord" between the States); *New York*, 505 U.S. at 158 ("The defect of power in the existing Confederacy to regulate the commerce between its several members [has] been clearly pointed out by experience") (quoting The Federalist No. 42, p. 267 (C. Rossiter ed. 1961)).

But the framers were equally cognizant of the fact that the deficiencies of the Articles of Confederation existed by design, due to a genuine and almost universal fear of a strong, centralized government. *See*, *e.g.*, *Bartkus* v. *People of State of Illinois*, 359 U.S. 121, 137 (1959) ("the men who

wrote the Constitution as well as the citizens of the member States of the Confederation were fearful of the power of centralized government and sought to limit its power"); *Garcia* v. *San Antonia Metropolitan Transportation Authority*, 469 U.S. 528, 568-69 (1985) (Powell, J., dissenting, joined by Chief Justice Burger and Justices Rehnquist and O'Connor). Our forebears had not successfully prosecuted the war against the King's tyranny merely to erect in its place another form of tyranny.

The central problem faced by the convention delegates, therefore, was to create a government strong enough to meet the threats to the safety and happiness of the people, yet not so strong as to itself become a threat to the people's liberty. *See* THE FEDERALIST NO. 51, at 322 (Madison). The framers drew on the best political theorists of human history to craft a government that was most conducive to that end. The idea of separation of powers, for example, evident in the very structure of the Constitution, was drawn from Montesquieu, out of recognition that the "accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny." THE FEDERALIST NO. 47, at 301 (Madison).

But the framers added their own contribution to the science of politics, as well. In what can only be described as a radical break with past practice, the Founders rejected the idea that the government was sovereign and indivisible. Instead, the Founders contended that the people themselves were the ultimate sovereign, *see*, *e.g.*, James Wilson, Speech at the Pennsylvania Ratifying Convention (Nov. 26, 1787), *reprinted in* 2 James Wilson, The Works of James Wilson 770 (Robert Green McCloskey ed., 1967), and could delegate all or part of their sovereign powers, to a single government or to multiple governments, as, in their view, was "most likely to effect their Safety and Happiness," Declaration of Independence, ¶ 2. The importance of the division of

sovereign powers was highlighted by James Wilson in the Pennsylvania ratifying convention:

> I consider the people of the United States as forming one great community, and I consider the people of the different States as forming communities again on a lesser scale. From this great division of the people into distinct communities it will be found necessary that different proportions of legislative powers should be given to the governments, according to the nature, number and magnitude of their objects.
>
> Unless the people are considered in these two views, we shall never be able to understand the principle on which this system was constructed. I view the States as made *for* the people as well as *by* them, and not the people as made for the States. The people, therefore, have a right, whilst enjoying the undeniable powers of society, to form either a general government, or state governments, in what manner they please; or to accommodate them to one another, and by this means preserve them all. This, I say, is the inherent and unalienable right of the people.

James Wilson, Pennsylvania Ratifying Convention, (Dec. 4, 1787), *reprinted in* 1 THE FOUNDERS' CONSTITUTION 62.

As a result, it became and remains one of the most fundamental tenets of our constitutional system of government that the sovereign people delegated to the national government only certain, enumerated powers, leaving the residuum of power to be exercised by the state governments or by the people themselves. *See*, *e.g.*, THE FEDERALIST NO. 39, at 256 (Madison) (noting that the jurisdiction of the federal government "extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects"); THE FEDERALIST NO. 45, at 292-93 (Madison) ("The powers delegated by the proposed Constitution to the federal

government are few and defined. Those which are to remain in the State governments are numerous and indefinite"); *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) (Marshall, C.J.) ("We admit, as all must admit, that the powers of the government are limited and that its limits are not to be transcended"); *Gregory*, 501 U.S. at 457 ("The Constitution created a Federal Government of limited powers").

This division of sovereign powers between the two great levels of government was not simply a constitutional add-on, by way of the Tenth Amendment. *See* U.S. CONST. Amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people"). Rather, it is inherent in the doctrine of enumerated powers embodied in that text of the main body of the Constitution itself. *See* U.S. CONST. ART. I, Sec. 1 ("All legislative Powers *herein granted* shall be vested in a Congress of the United States" (emphasis added)); Art. I, Sec. 8 (enumerating powers so granted); *see also M'Culloch*, 17 U.S. (4 Wheat.) at 405 ("This government is acknowledged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, . . . is now universally admitted"); *United States* v. *Lopez*, 514 U.S. 549, 552 (1995) ("We start with first principles. The Constitution creates a Federal Govern-ment of enumerated powers").

The constitutionally-mandated division of the people's sovereign powers between federal and state governments was not designed to protect state governments as an end in itself, but rather "was adopted by the Framers to ensure protection of our fundamental liberties." *Lopez*, 514 U.S. at 552 (quoting *Gregory*, 501 U.S. at 458); *see also Gregory*, 501 U.S. at 458-59; *Atascadero State Hospital* v. *Scanlin*, 473 U.S. 234, 242 (1985) (quoting *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 572 (1985) (Powell, J., dissenting)); *Garcia*, 469 U.S. at 582 (O'Connor,

J., dissenting) ("This division of authority, according to Madison, would produce efficient government and protect the rights of the people") (citing THE FEDERALIST NO. 51, pp. 350-351 (Madison) (J. Cooke ed. 1961)). "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Lopez*, 514 U.S. at 582 (quoting *Gregory*, 501 U.S. at 458); *Gregory*, 501 U.S. at 459 (quoting THE FEDERALIST NO. 28, pp. 180-81 (Hamilton) (J. Cooke ed. 1961)); *id.* (quoting THE FEDERALIST NO. 51, p. 323 (Madison) (J. Cooke ed. 1961)); *see also Garcia*, 469 U.S. at 581 (O'Connor, J., dissenting) ("[The Framers] envisioned a republic whose vitality was assured by the diffusion of power not only among the branches of the Federal Government, but also between the Federal Government and the States" (citing *FERC* v. *Mississippi*, 456 U.S. 742, 790 (1982) (O'Connor, J., dissenting)); *id* at 571 (Powell, J., dissenting) ("The Framers believed that the separate sphere of sovereignty reserved to the States would ensure that the States would serve as an effective 'counterpoise' to the power of the Federal Government").

When Congress acts beyond the scope of its enumerated powers, therefore, it does more than simply intrude upon the sovereign powers of the states; it acts without constitutional authority, that is, tyrannically, and places our liberties at risk. *See, e.g.,* THE FEDERALIST NO. 33, at 204 (Hamilton) (noting that laws enacted by the Federal Government "which are *not pursuant* to its constitutional powers, but which are invasions of the residuary authorities of the smaller societies . . . will be merely acts of usurpation, and will deserve to be treated as such").

Foremost among the powers not delegated to the federal government was the power to regulate the health, safety, and

morals of the people—the so-called police power. *See, e.g.*, THE FEDERALIST NO. 45, at 292-93 (Madison) ("The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State"); *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 203 (1824) ("No direct general power over these objects is granted to Congress; and, consequently, they remain subject to State legislation"); *United States* v. *E. C. Knight Co.*, 156 U.S. 1, 11 (1895) ("It cannot be denied that the power of a state to protect the lives, health, and property of its citizens, and to preserve good order and the public morals, 'the power to govern men and things within the limits of its dominion,' is a power originally and always belong to the states, not surrendered by them to the general government"). The powers at issue in this case—to define and punish assaults and to provide civil remedies for intentional torts and rape—are within the core of the police powers reserved to the states.

Congress does retain some measure of discretion to choose the means necessary for giving effect to its enumerated powers, of course, *see infra*, at 15, but it cannot use its discretionary power over means in furtherance of ends not granted to it. As Chief Justice Marshall noted in *M'Culloch* v. *Maryland*: "[S]hould congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the [national] government; it would become the painful duty of this tribunal . . . to say, that such an act was not the law of the land." 17 U.S. (4 Wheat.) at 423; *see also Carter* v. *Carter Coal Co.*, 298 U.S. 238, 317 (1936) (Hughes, C.J., separate opinion) ("Congress may not use this protective [commerce] authority as a pretext for the exertion of power to regulate activities and relations within the states which affect interstate commerce only indirectly"). Because, as described below, Congress's attempts to link the vintage exercise of the state police powers at issue here to its power to regulate interstate

commerce is pretext of the highest order, Chief Justice Marshall's admonition is directly on point: It is the duty of this Court to say that the VAWA is not the law of the land.

II. THE VAWA IS NEITHER A REGULATION OF COMMERCE NOR A NECESSARY AND PROPER MEANS OF GIVING EFFECT TO A REGULATION OF COMMERCE.

A. As Originally Conceived, Congress's Power Under the Commerce Clause Was Limited To The Regulation of Interstate Trade.

Both Congress in enacting the VAWA, and the Executive branch in defending it before this Court, make a telling conflation of terms that demonstrates just how far removed from the Founders' conception of the Commerce power this statute really is. The VAWA is a permissible exercise of Congress's power to regulate commerce among the states, notes the 1993 Senate Report, because "[g]ender-based violence bars its most likely targets—women—from full [participation] in the national *economy*." S. Rep. No. 138, 103rd Cong., 1st Sess., at 54 (1993) (cited in Brief for the United States, at 6) (emphasis added). "Violent crime against women costs this country at least 3 billion . . . dollars a year," and a "significant portion of these costs [is] attributeed to the impact of gender-motivated violence on victims' participation and performance *in the workplace*. *Id.* at 33, 54 (cited in Brief for the United States, at 6-7) (emphasis added).

For the Founders, "commerce among the states" was not synonymous with "the economy" or with "the workplace." Far from it. "Commerce" was trade, not business generally. *See, e.g.*, *Corfield* v. *Coryell*, 6 F.Cas. 546, 550 (C.C.E.D.Pa. 1823) (Washington, J., on circuit) ("Commerce with foreign nations, and among the several states, can mean nothing more than intercourse with those nations, and among those states, for purposes of trade, be the object of the trade what it may"). Indeed, in the first major case arising under the clause to

reach this Court, it was contested whether the clause even extended so far as to include "navigation." Chief Justice Marshall, for the Court, held that it did, but even under his definition, "commerce" was limited to "intercourse between nations, and parts of nations, in all its branches." *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 190 (1824); *see also Corfield*, 6 F.Cas. At 550 ("Commerce . . . among the several states . . . must include all the means by which it can be carried on, [including] . . . passage over land through the states, where such passage becomes necessary to the commercial intercourse between the states").

The *Gibbons* Court specifically rejected the notion "that [commerce among the states] comprehend[s] that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States." *Gibbons*, 22 U.S. at 194. In other words, for Chief Justice Marshall and his colleagues, the commerce clause did not even extend to trade carried on between different parts of a state. The notion that the power to regulate commerce included the power to regulate other kinds of business or the economy generally, therefore, was completely foreign to them.

This understanding of the Commerce Clause continued for nearly a century and a half. Manufacturing was not included in the definition of commerce, held the Court in *United States* v. *E.C. Knight Co.*, 156 U.S. 1, 12 (1895), because "Commerce succeeds to manufacture, and is not a part of it." "The fact that an article is manufactured for export to another State does not of itself make it an article of interstate commerce . . . ." *Id.* at 13; *see also Kidd* v. *Pearson*, 128 U.S. 1, 20 (1888) (upholding a state ban on the manufacture of liquor, even though much of the liquor so banned was destined for interstate commerce). Neither were retail sales included in the definition of "commerce." *See The License Cases*, 46 U.S. (5 How.) 504 (1847) (upholding

state ban on retail sales of liquor, as not subject to Congress's power to regulate interstate commerce); *see also A.L.A. Schecter Poultry Corp.* v. *United States*, 295 U.S. 495, 542, 547 (1935) (invalidating federal law regulating in-state retail sales of poultry that originated out-of-state and fixing the hours and wages of the intrastate employees because the activity related only indirectly to commerce).

For the Founders and for the Courts which decided these cases, regulation of such activities as retail sales, manufacturing, and agriculture was part of the police powers reserved to the states, not part of the power over commerce delegated to Congress. *See, e.g., E.C. Knight*, 156 U.S. at 12 ("That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the State") (citing *Gibbons*, 22 U.S. (9 Wheat.) at 210; *Brown* v. *Maryland*, 25 U.S. (12 Wheat.) 419, 448 (1827); *The License Cases*, 46 U.S. (5 How.) at 599; *Mobile Co.* v. *Kimball*, 102 U.S. 691 (1880); *Bowman* v. *Railway Co.*, 125 U.S. 465 (1888); *Leisy* v. *Hardin*, 135 U.S. 100 (1890); *In re Rahrer*, 140 U.S. 545, 555 (1891)). And, as the Court noted in *E.C. Knight*, it was essential to the preservation of the states and therefore to liberty that the line between the two powers be retained:

> It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for, while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States as required by our dual form of government. . . .

156 U.S. at 13; *see also Carter Coal*, 298 U.S. at 301 (quoting *E.C. Knight*); *Garcia*, 469 U.S. at 572 (Powell, J., dissenting, joined by Chief Justice Burger and Justices Rehnquist and O'Connor) ("federal overreaching under the

Commerce Clause undermines the constitutionally mandated balance of power between the States and the Federal Government, a balance designed to protect our fundamental liberties").

While these decisions have since been criticized as unduly formalistic, the "formalism"—if it can be called that at all—is mandated by the text of the Constitution itself. *See, e.g., Lopez*, 514 U.S. at 553 ("limitations on the commerce power are inherent in the very language of the Commerce Clause") (citing *Gibbons*); *id* at 586 (Thomas, J., concurring) ("the term 'commerce' was used in contradistinction to productive activities such as manufacturing and agriculture"). And it is a formalism that was recognized by Chief Justice Marshall himself, even in the face of a police power regulation that had a "consideral influence" on commerce:

> The object of [state] inspection laws, is to improve the quality of articles produced by the labour of a country; to fit them for exportation; or, it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the States, and prepare it for that purpose. They form a portion of that immense mass of legislation [reserved to the States]. . . . No direct general power over these objects is granted to Congress; and, consequently, they remain subject to State legislation.

Gibbons, 22 U.S. at 203; *see also id.* at 194-95 ("Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one. . . . The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State"). As this Court noted recently in *Lopez*, the "justification for this formal distinction was rooted in the fear that otherwise 'there would be virtually no limit to the federal power and for all practical

purposes we would have a completely centralized government." 514 U.S. at 555 (quoting *Schechter Poultry*, 295 U.S. at 548).

As should be obvious, the provision of VAWA at issue here is not a regulation of "commerce among the states," as that phrase was understood by those who framed and those who ratified the Constitution. Nor do the legislative findings about the impact of gender-motivated violance on the ecomony bring the VAWA under Congress's powers pursuant to the Necessary and Proper Clause. As has long been recognized, that clause gives Congress power over the means it will use to give effect to its enumerated powers; it does not serve as an end power unto itself. *See, e.g., Gibbons*, 22 U.S. (9 Wheat.) at 187 (describing the phrase "necessary and proper" as a "limitation on the means which may be used"); *M'Culloch*, 17 U.S. (4 Wheat.) at 324 (describing the Necessary and Proper Clause as merely a means clause). There has to be a regulation of commerce to which Congress hopes to give effect when it acts pursuant to the Necessary and Proper Clause, and there is no such regulation here. Congress simply cannot use such a pretextual reed to support its exercise of what is essentially a police power. *M'Culloch*, 17 U.S. (4 Wheat.) at 423. While it is undoubtedly true that, in today's world, the quantum of "commerce among the states" is much larger than in the founding era, the expansion in quantity does not give Congress a different qualitative power. Under the original view of the Commerce Clause, therefore, this is an extremely easy case.

B. Even Under The Expanded View of the Commerce Clause Taken In This Court's Modern-Era Precedents, The VAWA Exceeds The Outer Limits of the Power Afforded to Congress.

Even when the Court expanded the original understanding of the Commerce Clause in order to validate New Deal legislation enacted in the wake of the economic

emergency caused by the Great Depression, it was careful to retain certain limits lest the police power of the states be completely subsumed by Congress.

Thus, in *Jones & Laughlin Steel*, this Court stated that the power to regulate commerce among the states "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." 301 U.S. 1, 37 (1937) (cited in *Lopez*, 514 U.S. at 557). Similarly, Justice Cardozo noted in *Schechter Poultry* that "[t]here is a view of causation that would obliterate the distinction of what is national and what is local in the activities of commerce." 294 U.S. 495, 554 (1935) (Cardozo, J., concurring) (quoted in *Lopez*, 514 U.S. at 567).

These reservations were key to this Court's decision in *Lopez*. As in *Lopez*, the statute at issue here does not regulate the channels or the instrumentalities of interstate commerce. And although the Government's use of the "substantial effects" test discussed in *Lopez* essentially converts the Necessary and Proper Clause from a means clause to an ends clause (and therefore renders it constitutionally suspect, *see Lopez*, 514 U.S. at 584-85 (Thomas, J., concurring), the effects on interstate commerce articulated in the Congressional "findings" here are no different than the "cost of crimes" effect unsuccessfully relied upon by the Government in *Lopez*.

In short, even under the expanded view of the commerce clause that has been in place since the New Deal, this statute remains what it would have been for Chief Justice Marshall: A pretext for the exercise of police powers by Congress, powers that were and of right ought to be reserved to the states, or to the people. Given this Court's recent solicitude for the sovereignty of the States, *see, e.g.*, *Printz* v. *United States*, 521 U.S. 98 (1997); *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44 (1996); *Alden* v. *Maine*, 119 S.Ct. 2240 (1999); *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S.Ct. 2219 (1999); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 119 S.Ct. 2199 (1999), it would be odd indeed if Congress could intrude upon the powers reserved to the States, and hence on state sovereignty, in the much more substantial way presented by the VAWA.

III. THE VAWA CANNOT BE SUSTAINED AS AN EXERCISE OF CONGRESS'S POWER UNDER SECTION 5 OF THE 14th AMENDMENT.

In the VAWA, Congress has authorized a civil suit against private citizens, not against the state governments whose supposed denials of equal protection are the putative basis for the exercise of power here. But the 14th Amendment forbids the states from denying to any person the equal protection of the laws, not private persons. *See The Civil Rights Cases*, 109 U.S. 3 (1883). Even if such a private remedy might be permissible in some circumstances, it cannot be permissible where, as here, there is no underlying violation by the State. Christy Brzonkala was not denied the equal protection of the law; she did not even bother to avail herself of either the criminal law or tort law afforded to her by the Commonwealth of Virginia, and has never claimed that the State would not have enforced those laws on her behalf (much less that it would not have enforced those laws because of her gender).

Petitioners' contention is not that the State has discriminated against women in its laws against murder, or assault, or robbery, *see* Brief for the United States, at 42, but is rather that more needs to be done for victims of gender-motivated violence than is done for victims of ordinary, run-of-the-mill violence. In other words, petitioners all but concede that the states already provide equal protection; what

they seek here, and what VAWA provides them, is not a guarantee of equal protection but of special protection. This is necessary, apparently according to petitioners (and the so-called findings of Congress on which their argument is based), in order that conviction rates for rape (which disparately impacts women) can be made comparable to conviction rates for other crimes, such as murder or robbery. *See* S. Rep. No. 197, 102d Cong., 1st Sess., at 44 (1991) (describing the low conviction rate for rape) (quoted in Brief for the United States, at 9); *see also id.* at 43 (describing studies concuding "that crimes disproportionately affecting women are often treated less seriously than *comparable* crimes against men") (quoted in Brief for the United States, at 8) (emphass added).

Such a "comparable worth of crime" analysis finds no place in the jurisprudence of the 14th Amendment, and it should be rejected now. *See American Federation of State, County, and Mun. Employees, AFL-CIO* v. *State of Washington*, 770 F.2d 1401 (CA9 1985) (Kennedy, J.). The disparate impact theory upon which it is based suffers from the same infirmity. *See Washington* v. *Davis*, 426 U.S. 229 (1976). The 14th Amendment was designed to insure that individuals received equal protection from their state governments regardless of race, color, creed, or sex, not to give Congress a pretext for appropriating to itself a general police power or for providing additional remedies (such as the attorneys fees at issue here, which is what this case appears really to be about) to a particular class of citizens that the States have not provided to anyone.

There is no constitutional violation by the states here; hence, there can be no remedy under the 14th Amendment. *City of Boerne* v. *Flores*, 521 U.S. 507, 531-32 (1997). The VAWA simply cannot be sustained as an exercise of Congress's powers under Section 5 of the 14th Amendment.

CONCLUSION

The decision of the United States Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

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CHRISTY BRZONKALA, *Petitioner*,
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On Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

BRIEF OF AMICUS CURIAE EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF RESPONDENTS

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On Writ of Certiorari
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for the Fourth Circuit

INTEREST OF AMICUS CURIAE[1]

Eagle Forum Education & Legal Defense Fund ("Eagle Forum ELDF") is an Illinois nonprofit corporation organized in 1981. Its purpose is to study and research problems concerning the status of women and their civil, legal, economic and social rights by means of conferences, lectures, radio and television broadcasts, study groups, mailings, and the publication of papers, books, periodicals and legal memoranda; to train women by the above means to advance the status of women and to defend their rights, especially those pertaining

[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than Eagle Forum Education & Legal Defense Fund, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

to the family, marriage, children, education and employment; and to promote fair treatment in and access to the media for women of all vocations. Eagle Forum ELDF believes that the family rights of women are best defended and strengthened by maintaining jurisdiction over family law at the state, rather than the federal, level.

SUMMARY OF ARGUMENT

As the Fourth Circuit correctly held, federal laws regulating non-economic activity under the Commerce Clause must contain a jurisdictional element to ensure a sufficient relationship between the activity and interstate commerce. *See Brzonkala* v. *Virginia Polytechnic Institute and State University*, 169 F.3d 820, 831 (CA4 1999) (en banc). Unlike federal laws regulating economic activity, regulation of non-economic activity may not be justified based on the activity's aggregate effect of commerce. Rather, it must be targeted at only those instances of non-economic activity having specific connection to interstate commerce. The private cause of action created by the Violence Against Women Act ("VAWA"), 42 U.S.C. § 13981, lacks such a jurisdictional element and regulates intrastate non-economic behavior without any specific connection to interstate commerce.

Eagle Forum ELDF specifically calls this Court's attention to § 13981's regulation of domestic violence that has no interstate element and that is wholly non-economic in nature. Any Commerce Clause justification that would allow federal regulation of this aspect of domestic relations would equally support federal regulation of every aspect of marriage, divorce, and family law. But family law is perhaps the quintessential example of a local concern beyond the reach of federal regulation under the Commerce Clause. In addition to the precedential implications for family law, § 13981 itself significantly interferes with state law by undermining balanced state remedies to the complex and intractable problem of violence within intimate and ongoing relationships. It is neither constitutional nor prudent for Congress to impose its one-size-fits-all view of domestic relations on the states.

The Fourth Circuit was likewise correct that Congress' power to "enforce" the Fourteenth Amendment's prohibition against state denial of equal protection "does not extend to purely private conduct," but rather is limited to legislating against the states themselves and those acting as agents of, or in collusion with, the states. *Brzonkala,* 169 F.3d at 862.

Again calling attention to the example of domestic violence, § 13981 penalizes purely private conduct that is not attributable to state actors and that is unrelated to private interference with state legal processes. It does not in any sense "enforce" a prohibition directed at the states. Rather, it seeks to ameliorate the second-degree consequences of alleged state discrimination by providing a separate and independent remedy for the prior non-state action. In this way, § 13981 merely bypasses the states rather than corrects them and offers up a "separate but equal" legal regime in competition with the supposedly flawed – and unaltered – state legal regime. But ameliorating the effects of discrimination through a separate law of domestic violence runs counter to both federalism and equal protection principles.

Furthermore, because the Fourteenth Amendment argument in support of § 13981 depends upon alleged state bias that has no identifiable effect on the incidence of violence against women, claims under the law can continue indefinitely even after the constitutional predicate of state discrimination has ended. To allow constitutionality to turn on factors unrelated to the elements of the statute would subject § 13981 to continuous constitutional challenge dependant upon the constantly changing content and administration of state law. Constitutionality in such a case could never be finally settled; a result that surely casts doubt on the validity of the underlying justification.

Finally, Eagle Forum ELDF rejects the claim of certain *amici* that congressional "Treaty Power," as it relates to the International Covenant on Civil and Political Rights (ICCPR), provides authority for § 13981. Like the Commerce Clause argument, this argument proves far too much, as it would amount to an unlimited delegation of power to the federal government. Exclusive state jurisdiction over marriage and domestic relations, which is at the core of our constitutional federalism, cannot be trumped by an international treaty never approved by the House of Representatives and the States themselves. Furthermore, Congress itself did not even cite this overstated power as a basis for VAWA, much less for § 13981.

ARGUMENT

I. The Commerce Clause Does Not Create Federal Authority over Intrastate Domestic Violence.

Federal regulation of non-economic activities under the Commerce Clause must include a jurisdictional element to the regulation itself, and may not be predicated on the aggregate social effects of local activity. *See Brzonkala,* 169 F.3d at 831-44. Section 13981's regulation of gender-based violence lacks any requirement that the violence have some connection to interstate commerce, and therefore would cover a wide range of non-economic intrastate activity. It thus exceeds the authority granted the federal government under the Commerce Clause.

Petitioners rely primarily on the claim that the aggregate social costs of gender-based violence affect productivity and ultimately commerce. *See* U.S. Br. at 17, 23-27; Brzonkala Br. at 10-13, 20, 28-29. But petitioners cannot cite a single case where this Court has applied such a theory to non-economic activity. Rather, the Court has consistently required a jurisdictional element for regulation of such activity.

This limiting requirement is especially apropos with regard to the traditional state province of domestic relations and the quintessentially non-economic phenomenon of domestic violence. To endorse petitioners' "social cost" justification in the context of the domestic violence covered by § 13981 would necessarily extend Commerce Clause authority to every significant area of life and remove all meaningful distinction between state and federal authority. And, through § 13981 itself, it would significantly interfere with existing and future state laws targeted at the complex and varied problem of domestic violence.

A. Federal Regulation of Non-Economic Activity Lacking a Jurisdictional Element Exceeds Commerce Clause Authority.

Unlike the criminal provisions of VAWA, *e.g.*, 18 U.S.C. §§ 2261, 2262, 2265, the cause of action created by § 13981 contains no requirement that the violence alleged by a plaintiff be related to interstate commerce. This lack of a jurisdictional element results in federal regulation of wholly local non-economic activity with no direct connection to interstate commerce.[2]

As the Fourth Circuit explained, limiting application of the "substantially affects" test to economic activities is an essential limit on the Commerce Clause set out in this Court's many cases on that Clause. *See Brzonkala,* 169 F.3d at 836.

The decision in *United States v. Lopez*, 514 U.S. 549 (1995), confirms the jurisdictional defect of § 13981. There

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[2] Indeed, it is particularly ironic that violence against women that is motivated *purely* by economic motives and occurs directly in the channels of interstate commerce would *not* be covered by § 13981. The cause of action applies only to violence motivated by gender animus. 42 U.S.C. § 13981(d)(1); *id.* § 13981(e)(1). A train-station robbery for money or the murder of one woman by another to eliminate a particular competitor for a promotion both have connections to commerce or economic activity yet lack gender animus, and therefore neither would be covered under § 13981.

this Court rejected the argument that Congress could regulate social activities merely if they are related to the economic productivity of its citizenry. This Court found the "productivity" argument to be unacceptable, in part because it could justify federal regulation of "family law (including marriage, divorce, and child custody)." 514 U.S. at 564.

Section 13981, however, attempts to do precisely that: regulate domestic violence, which is an area central to family law. Like the statute invalidated in *Lopez*, § 13981 "by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms. ... It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affect interstate commerce. [It] contains no jurisdictional element which would ensure, through case-by-case inquiry, that the [gender-motivated violence] in question affects interstate commerce." 514 U.S. at 561.

In its brief, the United States denies any requirement in *Lopez* of a jurisdictional element, arguing that *Lopez* applied the "substantial effect" test of *Wickard v. Filburn*, 317 U.S. 111 (1942), to the non-economic activity of gun possession near schools. U.S. Br. at 30-31. The United States further argues that the earlier cases cited by *Lopez* "did not address whether the underlying activity was sufficiently commercial to justify regulation under the Commerce Clause. U.S. Br. at 31 (discussing *Wickard*, *McClung*, and *Heart of Atlanta Motel*). These arguments are particularly disingenuous because, as the Fourth Circuit noted, and the United States chooses to ignore, *Lopez* repeatedly and emphatically drew a distinction between regulation of economic and non-economic activity. 514 U.S. at 558, 559-60, 561, 566, 567. Contrary to the United States' claim, *Lopez* did not "appl[y]" *Wickard*, it distinguished it as "involv[ing] economic activity in a way that the possession of a gun in a school zone does not" and thus *rejected* its application to the non-economic activity of gun

possession near schools. *Id.* at 560; *see also id.* at 566 ("Admittedly, a determination whether an intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty. ... The Constitution mandates this uncertainty ....").[3]

For Congress to regulate activity under the Commerce Clause, the activity itself must be, in a word, commercial. As Justice Thomas wrote in *Lopez*, "the power to regulate 'commerce' can by no means encompass authority over mere gun possession, any more than it empowers the Federal Government to regulate marriage, littering, or cruelty to animals, throughout the 50 States. Our Constitution quite properly leaves such matters to the individual States, notwithstanding these activities' effects on interstate commerce." *Lopez*, 514 U.S. at 585 (Thomas, J., concurring).[4]

The government's alternative argument is that "even if Congress were limited after *Lopez* to regulating intrastate activity that has some economic component," § 13981 meets the

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[3] The Civil Rights Act of 1964 also concerned economic activities: business practices entailing repugnant racial discrimination. Title II of the Civil Rights Act expressly limited its scope with various jurisdictional elements. In *Heart of Atlanta Motel, Inc.* v. *United States*, this Court upheld the Act by expressly relying on its jurisdictional limitation: "the applicability of Title II is carefully limited to enterprises having a direct and substantial relation to the interstate flow of goods and people, except where state action is involved." 379 U.S. 241, 250-51 (1964)

[4] If the § 13981 civil remedy were upheld as sufficiently related to interstate commerce, so too would criminal penalties have to be upheld with the jurisdictional element removed. That Congress in this instance *chose* to include a jurisdictional element in the criminal provisions is beside the point. There is no commerce-based distinction between regulating commerce through criminal rather than civil measures. Any judicial interpretation of the Commerce Clause adequate to uphold § 13981 without a jurisdictional element would be adequate to sustain a criminal measure lacking a jurisdictional element. Whether some separate constitutional limit might check federal criminal law does nothing to justify destroying the independent check of the Commerce Clause's limited grant of power.

test because it "is designed to remedy gender-motivated violence that occurs at, or en route to, workplaces, retail establishments, and interstate transportation terminals *as well as in other settings*." U.S. Br. at 32 (emphasis added). The problem, of course, is that § 13981 is not limited to business settings, in contrast to the statute at issue in *Heart of Atlanta Motel*. That some minuscule subset of the cases reached by § 13981 might occur in a commercial context does not validate the sweeping regulation of the majority of non-economic cases.[5] The lack of a jurisdictional limitation renders § 13981 unconstitutionally broad.

B. Aggregate Social Costs of Intrastate Non-Economic Activities Do Not Establish Commerce Clause Jurisdiction.

Even if a particular jurisdictional element were not required, the general legal requirement of a substantial effect on interstate commerce cannot be satisfied by the mere aggregation of the social costs of local activity. Petitioners' reliance on the economic consequences of violence against women fails to distinguish such violence from any other local activity. Virtually every social problem has a monetary cost on society. Murder does. Suicide does. Divorce does. Addiction does. Elderly care does. Burglary does. Depression does. Accidents do. Accepting petitioners' rationale, therefore, would turn Commerce Clause authority into an unlimited federal police power and no area of state law would be beyond the reach of the Commerce Clause.

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[5] That § 13981 provides money damages for various economic injuries, U.S. Br. at 32, does not render it a regulation of interstate commerce. If it did, then the commerce power would extend to the entirety of tort law, contract law, and any other body of law in which damages may be recovered. That, of course, means *all* law. If the mere provision of damages were enough to create the requisite effect on interstate commerce, then there is nothing the federal government could not regulate through the creation of causes of action for its own or others' benefit.

The supporters of § 13981 argued at hearings that the monetary cost of violence against women is "'at least 3 billion ... dollars a year,'" U.S. Br. at 6 (quoting Senate Report), and, including "'health care, criminal justice and other social costs of domestic violence,'" as much as $5 to $10 billion annually. *Brzonkala*, 169 F.3d at 914 (Motz, J., dissenting) (quoting Senate Report).[6] But other local phenomenon exact an equal or greater toll on society. For example, roughly 22,000 persons were murdered in 1994.[7] If the victims' average expected lifetime earnings exceeded an inflation-adjusted $200,000 (10 years at $20,000 per year),

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[6] These figures, however, include many types of violence against women other than that motivated by animus towards women, as required by § 13981. Yet Congress engaged in no discernable fact-finding about the monetary cost of the violence that it regulates in § 13981: violence against women *because* of gender *and* motivated by animus against women. Rather, it evaluated data on all violence against women, never identified what portion of that violence was motivated by gender animus, and then made conclusory statements that such *subcategory* of violence had a substantial impact on the economy. *See Brzonkala*, 169 F.3d at 849-51. But there are reasons to believe that the costly violence cited by Congress is not necessarily motivated by animus towards women, including that a significant amount of domestic violence is perpetrated by women against men. For an objective look at domestic violence statistics, *see* Carey Goldberg, "Spouse Abuse Crackdown, Surprisingly, Nets Many Women," New York Times, Nov. 23, 1999, at A16 ("Defenders of battered women long struggled to persuade authorities to crack down on brutal men who reigned by the fist at home. But those crackdowns have produced an unexpected consequence: in some places, one-quarter or more of arrests for domestic assault are not of men but of women. In Concord, N.H., nearly 35 percent of domestic assault arrests this year have been of women, up from 23 percent in 1993. ... And in Boulder County, Colo., one-quarter of defendants charged in domestic violence cases through September were women. ... A different federal poll, the National Violence Against Women survey ... found that ... 1.5 million women and 835,000 men annually were raped or assaulted by an intimate partner, a ratio of just under two to one."). Domestic violence is more a problem regarding conflict in intimate relationships than one of gender discrimination.

[7] Statistical Abstract of the United States 1996, at 2034, Table No. 314.

then the total annual monetary cost of murder would be in excess of $4.4 billion. But surely Congress could not justify regulating common law murder merely by holding hearings based on this monetary cost. Each year more than 1,000,000 couples file for divorce, which typically requires legal fees, court costs, and substantial charges to maintain two households instead of one.[8] If the average total cost of a divorce exceeds $15,000, then divorce imposes a monetary cost on the nation in excess of $15 billion per year. But surely such monetary estimates do not confer jurisdiction on Congress to regulate divorce under the Commerce Clause.

Monetary costs to society of a vice do not substantially affect interstate commerce within the meaning of Commerce Clause precedents. The alleged economic effects from the domestic violence regulated by § 13981 are not intrinsic to the activity, but are merely second-order effects associated with any societal problem.

Domestic violence, like the possession of a gun, "is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." *Lopez*, 514 U.S. at 567. While it is at least plausible (if not always persuasive) for Congress to assert a need to regulate local *economic* activity in order to regulate interstate markets, it becomes mere sophistry for Congress to claim that the regulation of purely local domestic violence in any way affects interstate commerce so as to interfere with federal regulation of such commerce.

If the federal civil remedy provision of VAWA is upheld, then virtually all other aspects of domestic relations would be subject to federal interference as well:

- *Alimony*. The payment of alimony is an actual economic transaction, and thereby implicates commerce to a much

[8] *See id.* at 74, Table No. 90.

greater degree than the domestic violence regulated by § 13981.

- *Marital Property Rights*. Like alimony, the division of marital property involves inherently economic matters and likely has a greater monetary impact than the behavior regulated by § 13981.
- *Child Custody*. Child custody disputes are enormously disruptive of the lives, productivity and wealth of all involved, create inefficiencies of joint custody, and may involve interstate custody issues. The connection to interstate commerce is thus at least as strong as in the case of gender-motivated domestic violence.
- *Marriage and Divorce*. The institution of marriage has a tremendous financial impact on society, altering consumption patterns in things such as housing and food, and triggering altered treatment in insurance, taxes, car rentals, and other economic transactions. Divorce has an equal and opposite impact, and has tremendous transaction costs that impact the economy. The speculative effect on commerce from that unknown percentage of violence that is motivated by gender animus is small compared to the economic impact of marriage and divorce.
- *Adoption*. As any parent and many others well know, adding a child to a household has an enormous impact on consumption, productivity, and the use of interstate goods and services such as food, toys, and television. The aggregate effects of the many adoptions around the country would form as good an excuse for federal regulation as the effects alleged to justify § 13981.

Each of the above issues has traditionally been within the exclusive jurisdiction of the states, and heretofore has been considered unrelated to interstate commerce absent a specific interstate element to the activity. Yet there is absolutely nothing in the petitioners' construction of the Commerce Clause

that would not equally authorize federal intrusion into these areas of local activity and state concern.

In sum, no amount of estimated societal cost justifies intrusion by Congress into traditional state areas like domestic relations. The amendment process, not the Commerce Clause, is the only permissible means for shifting such authority from the states to the federal government.[9]

C. Section 13981 Interferes with Traditional State Sovereignty over Domestic Relations.

Not only does § 13981 rely upon a legal theory of unlimited federal power, it also supplants and undermines state efforts to provide a balanced response to the nuanced local problem of domestic violence. As the "laboratories for experimentation" operating under our federalism,[10] states have been vigorously refining their local remedies to what is quintessentially a local problem. Section 13981 is already in conflict with the rapidly developing state laws in this area, and such conflicts will only increase as state remedies are optimized.

[9] The claim that the states support VAWA and hence there is no intrusion, U.S. Br. at 10, 36, is both misleading as to the predicate and incorrect as to the conclusion. First, there is no indication that the states support § 13981 as opposed to the other aspects of VAWA. While one might expect state enthusiasm over huge federal grants for education and training, 42 U.S.C. § 3796gg, and state endorsement of VAWA's mechanisms for dealing with cross-border violence beyond any one state's control or for interstate enforcement of restraining orders, 18 U.S.C. §§ 2261, 2262, 2265, it is untenable to argue that states would endorse § 13981's rejection and bypass of state law. Nothing in petitioners' briefs suggest state support for § 13981 in particular, as opposed to those other provisions of VAWA not here being challenged. Furthermore, even if various State Attorney Generals *did* support § 13981 in particular, that does not constitute "state" support. If the states truly supported the cause of action created by § 13981, one would at least expect them to adopt analogous state-law causes of action and to abrogate the various state-law defenses with which § 13981 dispenses. That they have not done so suggests that the "states," as represented by their law-making bodies, do not support § 13981. Though some members of state executive branches might think otherwise and repudiate their own state laws, such dissension within the states does not constitute "state" support for § 13981.

[10] *Lopez*, 514 U.S. at 581 (Kennedy, J., concurring).

For example, numerous state legislatures have passed "primary aggressor" laws that take a more comprehensive approach to evaluating the complex and ongoing interactions that periodically erupt in domestic violence. Backed by many women's groups, these laws place a heavy emphasis on prompt and detailed investigation of all charges of domestic violence and require the local police to examine a variety of factors with respect to a domestic dispute in order properly to ascertain fault and take appropriate remedial action. The guilty party is not always the person who struck first or most violently and is not always a man.

The California primary aggressor statute is illustrative. The investigator must identify the "primary aggressor" by considering, in addition to interviewing witnesses and examining evidence of actual violence, the following:

> (i) the intent of the law to protect victims of domestic violence from continuing abuse;
>
> (ii) the threats creating fear of physical injury;
>
> (iii) the history of domestic violence between the persons involved; and
>
> (iv) whether either person acted in self defense.

Cal. Penal Code § 836(c)(3) (West Supp. 1999). California also requires that each and every law enforcement agency develop, adopt and implement written policies and standards for officers' responses to domestic violence calls, treat domestic violence as alleged criminal conduct, and encourage the arrest of domestic violence offenders if there is probable cause that an offense has been committed. *Id.* § 13701.

An Ohio statute is similar, requiring a peace officer to determine the primary aggressor by considering any "history

of domestic violence or any other violent acts by either person involved," whether "the alleged violence was caused by a person acting in self-defense," "[e]ach person's fear of physical harm, if any, resulting from" threats or prior violence, and the "comparative severity of any injuries suffered by the persons involved in the alleged offense." Ohio Rev. Code Ann. § 2935.03(B)(3)(d) (Page Supp. 1998). Other states have recently enacted similar laws.[11]

By recognizing that any given example of domestic violence is usually one event in a much larger cycle of interactions that preceded and will follow the violence, these state laws offer a far more sophisticated and precise response to the larger problem of which domestic violence is a part than does the crude one-size-fits-all federal remedy of § 13981. Developing state remedies promote prompt and detailed investigation of claims of domestic violence and the broader circumstances surrounding those claims. Section 13981, by contrast, discourages resort to state enforcement or investigatory processes, which appears to be its purpose. *See* § 13981(e)(2); U.S. Br. at 44 n. 24; Brzonkala Br. at 48. The statute encourages potential plaintiffs to make unchecked allegations years

[11] *See, e.g.*, Colo. Rev. Stat. Ann. § 18-6-803.6(2) (West 1999); D.C. Metro. Police Dep't., General Order 304.11, Intrafamily Offenses 10-12 (Jan. 12, 1998); Fla. Stat. Ann. § 741.29(4)(b) (West Supp. 1999); Haw. Rev. Stat. § 571-46(9) (1989) (basing child custody determinations on state primary aggressor rule); Iowa Code Ann. § 236.12 (West 1994); Md. Ann. Code art. 27-594B(d)(2) (1996); Mich. Comp. Laws Ann. § 776.223(b)(ii) (West Supp. 1999); Mo. Ann. Stat. § 455.085(3) (West 1997); Mont. Code Ann. § 46-6-311(2)(6) (1997); N.H. Rev. Stat. Ann. § 173-B:9 (1994); N.Y. Crim. Pro. Law § 140.10(4)(c) (Consol. Supp. 1999); R.I. Gen. Laws § 12-29-3(c)(2) (1994); S.C. Code Ann. § 16-25-70(D) (Law Co-op. Supp. 1998); Utah Code Unann. § 77-36-2.2(3) (1998); *see also* "Arrests of Women Increase Under Calif. Domestic Violence Law," Wash. Post, Nov. 26, 1999, at A11 ("Police in at least 24 states now receive training in how to decide who is the 'primary aggressor,' a term that does not necessarily mean the person who struck the first blow or even caused the most damage, according to the National Council of Juvenile and Family Court Judges.").

later in federal court without the benefit of a contemporary investigation. Section 13981 also undermines the states' judgment that a multi-factor consideration of action and reaction in domestic situations is essential to identifying the wrongdoing and breaking the cycle of violence. Ignoring the overall context of violence, § 13981 allows any allegation of isolated violence to constitute the basis for a federal cause of action regardless of the history between the parties. Section 13981 thereby allows a federal cause of action for an alleged felony that is separated from aggression that may have preceded and incited it. And by allowing a delayed cause of action by a person who was or would have been determined a primary aggressor under state law, § 13981 repudiates state resolution of a multifaceted problem and arguably creates a new tool of aggression through the federal courts.[12]

The United States omits any mention of the developing state laws, like the primary aggressor statutes, and argues that § 13981 "displaces no state law and prohibits no state action." U.S. Br. at 33. But § 13981 displaces state law in the same way that the federal gun statute in *Lopez* did: It creates a federal alternative to state law that would trade off with state remedies regardless of whether the statute technically leaves state law intact. Furthermore, by allowing primary aggressors to sue on isolated instances taken out of the full context of the relationship, § 13981 frustrates final state resolutions of diffi-

[12] In a variety of circumstances, § 13981 could undermine state law in a particularly perverse way. As supporters of § 13981 concede, in about one-sixth of the cases domestic violence is perpetrated by a woman against a man, and there are inevitably cases of domestic violence between two females. Brief of Amici National Network to End Domestic Violence *et al.*, at 4 & n. 6 (citing United States Department of Justice, *Bureau of Justice Statistics Special Report: Violence Against Women: Estimates from the Redesigned Survey* 1 (1995)). If the victim complains to state authorities about violence perpetrated by the other, than the perpetrator will be free to undermine that process by suing in federal court.

cult domestic disputes.[13] Section 13981 thus operates to "foreclose[] the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise, and it does so by regulating an activity beyond the realm of commerce in the ordinary and usual sense of that term." 514 U.S. at 583 (Kennedy, J., concurring).

II. Enforcement Under the Fourteenth Amendment Must Be Directed Against Discrimination by State Actors, Not at Purely Private Behavior.

As this Court has reiterated for over 100 years, while the Fourteenth Amendment enables Congress to eradicate discrimination caused by government, it does not extend to purely private conduct like domestic relations. *See, e.g.*, *City of Boerne* v. *Flores*, 521 U.S. 507, 522-23 (1997); *United States* v. *Harris*, 106 U.S. 629, 638-39 (1883); *Civil Rights Cases*, 109 U.S. 3, 11-12 (1883).

Although petitioners acknowledge this basic principle, they claim that Congress is entitled to regulate purely private actors if and when such regulation is designed as a *response* to state-based discrimination. Such a reading has never been endorsed by this Court and would distort the language and subsequent application of Section 5 of the Fourteenth Amendment.

[13] Section 13981 also allows claims to be brought up to four years after the alleged incident, and without any contemporaneous, independent investigation. 28 U.S.C. § 1658. This conflicts with the shorter, and more sensible, statute of limitations in effect in most states. *See, e.g.*, Va. Code § 8.01-243A ("every action for personal injuries, whatever the theory of recovery … shall be brought within two years after the cause of action accrues").

A. Ameliorating the Effects of State Discrimination Is Not Enforcement of a Prohibition Against State Discrimination.

Recognizing that § 13981 does not operate against the states and does not prevent or punish unlawful state discrimination, petitioners instead argue that the law is a response to such discrimination in that it independently gives crime victims what they cannot get from the state: vindication and compensation from the private criminals. Petitioner Brzonkala argues, for example, that § 13981 is intended to "remedy *the effects* of formal barriers to redress such as marital rape and interspousal tort immunities, which Congress found reflected and perpetuated outdated stereotypes." Brzonkala Br. at 44 (emphasis added). Petitioners also argue that § 13981 responds to "bias by state officials [barring] access to the justice system" by "authoriz[ing] a claim that the victim controls" and by providing "victims the opportunity to be heard by judges who are insulated from local political and other pressures." Brzonkala Br. at 46; *see also* U.S. Br. at 37 (redress "that the victim, not the State, controls").

But providing a separate path to a supposedly "equal" result is not "enforcement" of the Fourteenth Amendment's prohibition on state denial of equal protection and has no effect on state discrimination itself. Congress must focus on the *cause* or the *mechanism*, not the *effect*, of state-sponsored discrimination.

The language of the Fourteenth Amendment limits Congress' power to *enforcement* of the substantive commands of the Fourteenth Amendment. Section 5 of the Fourteenth Amendment states that "[t]he Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." U.S. Const., Amend. XIV, sec. 5. The relevant provision Congress claims to be enforcing by § 13981 is the command that "*[n]o state shall deny* to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amend. XIV, sec. 1 (emphasis added). In order to "enforce"

this limitation on state action, Section 5 legislation must be directed against, or at least affect, those who have violated or would violate the limitation.

Petitioners adopt the novel position that legislation ameliorating the secondary consequences of state discrimination enforces the Fourteenth Amendment regardless of whether the remedy is directed at or even involves the perpetrators of the violation. But on this reasoning Congress could simply give money to women crime victims and claim that it was enforcing the Fourteenth Amendment by providing otherwise uncertain compensation. Such an approach is akin to attempting to cure a disease (state-sponsored discrimination) through cosmetic treatment of a symptom (absence of compensation for private violence). Yet that is precisely the unconstitutional approach taken by § 13981.

Ameliorating the downstream effects of a violation of the Fourteenth Amendment in a manner that neither punishes nor deters that violation or future violations is not enforcement of the prohibition against discrimination. Women may receive a proxy (federally extracted money) of what they would have received from the state, but that proxy neither negates the existence of the alleged equal protection violation nor does it deter future violations by the state. In fact, any existing equal protection violation would continue unabated even after § 13981 were invoked, and such an alternative legal regime increases the likelihood of further violations by reducing the public pressure on the states to improve their own justice systems. *Cf. Lopez,* 514 U.S. at 577 ("Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory.") (Kennedy, J., concurring). Section 13981 allows unconstitutional state behavior simply to be ignored while alleged victims turn to federal rights and federal courts. The statute thus supplants state

processes without enforcing the requirement that the states not discriminate.[14] Indeed, even petitioner Brzonkala seems to recognize that § 13981 merely provides "an alternative to state remedies," Brzonkala Br. at 48, rather than a remedy to state violations of the Fourteenth Amendment.[15]

Section 5's focus on the perpetrators of the *constitutional* violation – *i.e.*, the state or its agents – is reflected in the uniform holdings of this Court that the Fourteenth Amendment does not apply to purely private actors. Those holdings are amply reviewed in the opinion below, and petitioners do nothing more than repeat objections that were exhaustively debunked by the Fourth Circuit. *See Brzonkala,* 169 F.3d at 862-889.

The citations by petitioners and their amici to *United States* v. *Guest*, 383 U.S. 745 (1966), *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966), and *District of Columbia* v. *Carter*, 409 U.S. 418, 424 n. 8 (1973) are particularly unavailing. In *Guest*, this Court reiterated that "[t]he Fourteenth Amendment

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[14] In many ways, this case resembles an unconstitutional conditions case, with the state allegedly denying women the benefits of vindication and compensation based solely on their gender. The typical solution in such a case is to strike down the discriminatory barrier to the state benefits, not to have a different entity provide separate but supposedly equal benefits. This Court said as much in *Brown* v. *Board of Education*, 347 U.S. 483, 495 (1954), and the principle is equally applicable in this context. State discrimination in the provision of benefits such as law enforcement does not become less discriminatory due to federal efforts to offset the effects of such discrimination.

[15] The provision of federal jurisdiction likewise does not address the alleged violations. The statute does not provide federal jurisdiction over claims under state law, but only over claims under the newly enacted federal substantive law. The law is thus unlike diversity jurisdiction, which ensures that prejudice in the application of existing state law does not occur and that *state* laws are equally applied to non-citizens of the state. By supplanting not only the forum, but the substantive law as well, while leaving intact the allegedly discriminatory systems and laws in the states, the new law does nothing to remedy the violations alleged.

protects the individual against state action, not against wrongs done by individuals. … This has been the view of the Court from the beginning." 383 U.S. at 755 (citations and quotation marks omitted). The Court had no occasion to discuss the threshold level of state action involved because "the indictment in fact contains an express allegation of state involvement sufficient at least to require the denial of a motion to dismiss." 383 U.S. at 756.

In *Katzenbach* v. *Morgan*, the Court held that Congress has the power to invalidate state laws requiring English literacy by voters. The statute at issue operated directly against the state and its subdivisions and hence did not seek to enforce the Fourteenth Amendment by regulating purely private conduct. 384 U.S. at 647 ("Such exercises of state power are no more immune to the limitations of the Fourteenth Amendment than any other state action."). That the law forbade state acts that did not *necessarily* violate the Fourteenth Amendment does not help petitioners in this case. A determination of state discrimination turned on a number of legislative facts regarding the need for and consequences of an English-only voting restriction. The Court was willing to defer to congressional findings leading to the general conclusion that the state laws "constituted an invidious discrimination in violation of the Equal Protection Clause," 384 U.S. at 656, even though it might not have substituted a judicial determination regarding legislative facts for a state determination in an individual case. That Congress identified sufficient facts giving rise to Fourteenth Amendment violations, and then acted directly to forbid such violations, was sufficient. In this case, by contrast, § 13981 does nothing to forbid the states from committing the violations that Congress purported to find. It does not act on the states at all.

Finally, in *Carter* the issue under consideration had nothing to do with the scope of Congress' Section 5 authority. The footnoted assertion by Justice Brennan in that case that Congress might "proscribe purely private conduct" is the purest of dicta, having nothing to do with the case and citing non-authoritative opinions as support. 409 U.S. at 424 n. 8. Furthermore, even that dictum is ambiguous in its application to this case. One might speculate about Section 5 legislative authority over a "purely private" conspiracy to disrupt, manipulate, or deny access to state legal processes or facilities in a manner that would deny certain groups equal protection of the state laws, without suggesting Congressional authority to regulate private-on-private conduct that is in no way directed at state processes or facilities. Indeed, the citation to *Guest* suggests that such is the scenario Justice Brennan had in mind, not a law directed at private actions unrelated to public facilities. *See Guest*, 383 U.S. at 762 (Clark, J., concurring) (opining on Congressional "power to punish private conspiracies that interfere with … the right to utilize public facilities"); *id.* at 780-81 (Brennan, J., dissenting) ("Whatever may be the status of the right to equal utilization of privately owned facilities, … it must be emphasized that we are here concerned with the right to equal utilization of public facilities owned or operated by or on behalf of the State."). Even the overreaching dictum in *Carter*, therefore, does not reach far enough to sustain § 13981's action covering private violence not aimed at denying access to state processes or facilities.

Neither petitioners nor their amici can cite a single precedent for applying the Fourteenth Amendment to private conduct completely removed from state action. Instead, petitioner Brzonkala argues that "[t]his Court never has struck Section 5 legislation extending to private conduct where, as here, Congress enacted the law in response to a documented record of historic discrimination fueling equal protection violations." Brzonkala Br. at 47. This distortion was the subject of extensive discussion by the Fourth Circuit, *see* 169 F.3d at 870-73, and it is reckless to merely repeat it on appeal without even an attempt to address the Fourth Circuit's recitation of the plain historical record refuting it.

The United States also argues that "Section 13981 is properly viewed as 'corrective legislation, that is, such as may be necessary and proper for counteracting ... such acts and proceedings as the States may commit or take, and which by the [Fourteenth] amendment they are prohibited from committing or taking.' *Civil Rights Cases*, 109 U.S. at 13-14." U.S. Br. at 48. This argument takes the phrase "corrective legislation" grossly and deceptively out of context. In the text immediately preceding the passage quoted by the United States, the Court makes clear that it rejects the very core of the United States' position that an alternative federal remedy can "correct" a state denial of rights:

> It is absurd to affirm that, because the rights of life, liberty, and property (which include all civil rights that men have) are by the amendment sought to be protected against invasion on the part of the state without due process of law, congress may, therefore, provide due process of law for their vindication in every case; and that, because the denial by a state to any persons of the equal protection of the laws is prohibited by the amendment, therefore congress may establish laws for their equal protection.

Civil Rights Cases, 109 U.S. at 13. Correction and counteraction of unconstitutional state laws and actions is not to be had by the creation of competing federal laws, but rather must be directed against the unconstitutional state action itself. The proper scope of Section 5 authority described in the *Civil Rights Cases* is "merely power to provide modes of redress *against* such state legislation or action." *Id.* at 15 (emphasis added).

In the end, amelioration or compensation is not enforcement when not a means of preventing or deterring the state constitutional violations themselves. The creation of a "separate but equal" regime of federal law as an alternative to unaltered and allegedly discriminatory state justice systems not only exceeds Congress' Section 5 authority, it offends principles of both equal protection and federalism. If the states are discriminating against women, it is their duty to end such discrimination and Congress' right to force them to abandon their discriminatory ways. But it is not Congress' prerogative to set up a parallel and wholly separate system of regulation to compete with state law in any field in which it perceives state error.[16]

B. Section 13981 Is Not Proportional to the Alleged Violations Due to the Lack of a Jurisdictional Element Tied to State Discrimination.

Even were it permissible for Section 5 enforcement legislation to operate on the effects, rather than the causes, of state discrimination, § 13981 is still unconstitutional because it is not proportional to the violation asserted. Under § 13981, any victim of gender-based violence can sue, regardless of the existence of state discrimination or its impact on the plaintiff. The most palpable example of such overbreadth is that a victim of such violence may sue under § 13891 even if her assailant has been convicted and punished in state court and even if she has successfully sued and recovered under existing state civil remedies. This flaw is caused by the lack of a jurisdictional requirement in § 13981 that the plaintiff make at least a colorable showing that she was the victim of state discrimination before invoking a supposed means of enforcing against such discrimination.

Indeed, a § 13981 action is entirely removed from state action. The statute expressly mandates that "[n]othing in this

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[16] That other aspects of VAWA – such as education and training of state officials – may act directly to correct and prevent state discrimination is irrelevant to the constitutionality of the civil action provision. Those separate provisions do not transfer their constitutionality to the unconstitutional § 13981. Likewise, the claim that the civil suit provision may deter the *criminals* from discriminating against women is not relevant to the Fourteenth Amendment analysis because that private discrimination is not a constitutional violation and is not causative of state discrimination.

section requires a prior criminal complaint, prosecution, or conviction," and thereby creates a remedy regardless of whether the state has discriminated. 42 U.S.C. § 13981(e)(2). Instead of working to reform state-based discrimination, § 13981 essentially bypasses and abandons it.

Furthermore, even assuming some instances of discrimination, in many other instances the action provided by § 13981 is tantamount to giving money to women who have suffered no demonstrable discrimination simply because some *other* women may have suffered discrimination. That is not enforcement of the Fourteenth Amendment's prohibition against state discrimination.

In much the same way as a jurisdictional element in Commerce Clause cases ensures that Congress is not overstepping its limited authority, so too would a jurisdictional element requiring some demonstration of state discrimination ensure that Congress hews to its limited Fourteenth Amendment enforcement authority. Indeed, petitioners do not cite a single case upholding Fourteenth Amendment enforcement authority where the relevant law lacked a state-action jurisdictional element.

C. Courts Will Be Unable To Resolve with Finality the Contingent Constitutionality of Laws Targeted at Second-Order Effects Rather than at Fourteenth Amendment Violations.

If the entire predicate of Fourteenth Amendment authority for § 13981 turns on the present existence of discrimination in the states and the consequent effect of that state discrimination, but the cause of action does not require evidence of such discrimination, then the Court would have to repeatedly review the constitutionality of § 13981. Once unconstitutional state action had ceased, § 13981 would become unconstitutional. Such contingent constitutionality can never be settled with finality and would be subject to repeated challenge by

any defendant. Not only would such a result be a nightmare for the administration of justice, it strongly suggests that the interpretation of the Fourteenth Amendment leading to the result is incorrect. A correct interpretation of the Fourteenth Amendment enforcement authority is not subject to such absurd consequences. Where legislation operates directly against the acts violating or threatening to violate the Amendment, changes in the background facts make no difference to the validity of the law.

The federal cause of action for constitutional violations provided by 42 U.S.C. § 1983 is an example of a proper tethering of the enforcement authority to constitutional violations. If the state and its agents stop discriminating, there may little occasion to invoke § 1983, but the legislation itself would remain valid and constitutional. Its application is triggered by the particular acts of state discrimination whenever they may occur, and thus enforces the constitutional prohibition entirely apart from whether there exist any *present* violations. Any time in the future that § 1983 was invoked, the constitutional predicate for its action would be satisfied. By contrast, even where all state discrimination ceased, § 13981's remedy against private persons would continue to be invoked with no needed connection to the constitutional predicate. The only legal requirement is that the criminal was biased, not that the state discriminated. Claims under § 13981 would continue or even increase if the states more vigorously enforced their laws against rape or domestic abuse. (A state conviction would go a long way towards establishing a plaintiff's case under § 13981.)

III. Congressional "Treaty Power" Does Not Extend to Domestic Relations.

Amici Curiae International Law Scholars and Human Rights Experts argue that § 13981 is supportable as an exercise of treaty power, in particular as implementation of the International Covenant on Civil and Political Rights (ICCPR).

But neither they nor petitioners cite anything to suggest that Congress enacted § 13981 to implement the ICCPR or any other treaty. Such a *post hoc* rationalization for § 13981 as an exercise of treaty power is untenable and, in any event, is contrary to the essence of federalism.

The President and the Senate cannot transfer, by treaty, authority over purely intrastate matters like domestic violence from the States to Congress. The Supreme Court considered and rejected an attempted use of the treaty power in *Reid v. Covert*, 354 U.S. 1 (1957), which *amici* fail to distinguish or even reference. *Reid*, coincidentally, involved domestic violence in which male military officers stationed abroad were murdered by their wives. This Court held that Congress had exceeded its constitutional authority in authorizing trial of the defendants before military tribunals, pursuant to the Congressionally mandated Article 2(11) of the Uniform Code of Military Justice, 50 U.S.C. § 552(11), rather than in conventional courts. 354 U.S. at 5. In so holding, the Court rejected the argument of the government that the statutory mandate to use military rather than conventional courts in such cases was necessary and proper in light of United States' obligations under treaties with England and Japan.[17]

"The obvious and decisive answer to this, of course, is that no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution." 354 U.S. at 16. As the *Reid* Court further explained:

> "The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the gov-

[17] *See* 354 U.S. at 42 (Frankfurter, J., concurring) (citing the agreement with Great Britain, 57 Stat. 1193, E. A. S. No. 355, and the United States of America (Visiting Forces) Act, 1942, 5 & 6 Geo. VI, c. 31; and the 1952 Administrative Agreement with Japan, 3 U.S. Treaties and Other International Agreements 3341, T. I. A. S. 2492).

> ernment or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent."

Id. at 17-18 (quoting *De Geofroy* v. *Riggs*, 133 U.S. 258, 267 (1890)); *see also Boos v. Barry*, 485 U.S. 312, 324 (1988) ("'rules of international law and provisions of international agreements of the United States are subject to the Bill of Rights and other prohibitions, restrictions or requirements of the Constitution and cannot be given effect in violation of them.'") (quoting 1 Restatement of Foreign Relations Law of the United States 131, Comment a, p. 53 (Tent. Draft No. 6, Apr. 12, 1985)). The exclusive authority of the States over domestic relations plainly qualifies as "arising from the nature of the government itself and of that of the States." Simply put, the structural requirements of federalism cannot be trumped by an international agreement never embraced by the states themselves. Congress therefore cannot usurp authority over marriage, divorce and other local issues under the guise of treaty power.[18]

[18] *Reid* is consistent with the doctrine that treaties and statutes are of equivalent legal status. "It would be completely anomalous to say that a treaty need not comply with the Constitution when such an agreement can be overridden by a statute that must conform to that instrument." *Reid*, 354 U.S. at 18. *See also Head Money Cases*, 112 U.S. 580, 599 (1884) ("The Constitution gives [a treaty] no superiority over an act of Congress in this respect [of priority], which may be repealed or modified by an act of a later date. Nor is there anything in its essential character, or in the branches of the government by which the treaty is made, which gives it this superior sanctity."); Henkin, *Lexical Priority or "Political Question": A Response*, 101 Harv. L. Rev. 524, 533 (1987) (noting that treaties have no greater legal weight than acts of Congress).

Amici rely on several statements by the Executive branch asserting that VAWA represents an implementation of the ICCPR treaty. But these assertions were all made well after the passage of VAWA in 1994, and thus amount to nothing more than a *post hoc* attempt to salvage the jurisdictional defect of § 13981. *Reid*, 354 U.S. at 15-17. The Executive branch does not have quasi-judicial authority in passing judgment on the jurisdictional merits of enacted legislation. That task necessarily belongs to the judiciary. Furthermore, before this Court should undertake to consider such a sweeping and unprecedented assertion of Congressional authority to implement the treaty power, it should at least be incumbent upon Congress to make plain its intent to raise the constitutional question. After-the-fact assertions by the Executive that Congress intended to test the limits of the Constitution are not enough.

Amici rely heavily on *Missouri v. Holland*, 252 U.S. 416 (1920), which concerned a treaty to protect migratory birds that passed through Canada and the United States. In that decision, however, the Court expressly limited its holding to "a national interest [that] ... can be protected only by national action in concert with that of another power. The subject-matter is only transitorily within the State and has no permanent habitat therein." 252 U.S. at 435. In contrast, § 13981 does not concern any matter that requires "national action in concert with that of another power." Nor does § 13981 concern "subject-matter [that] is only transitorily within the State." To the contrary, § 13981 regulates subject-matter that, for the most part, occurs solely within a state, without any connection with foreign nations or even with other states.

United States v. Arjona, 120 U.S. 479 (1887), likewise fails to support extension of the treaty power to strictly domestic matters. There the Court upheld a statute that criminalized private counterfeiting of securities of foreign governments. The holding stands for the simple proposition that "[t]he law of nations requires every national government to

use 'due diligence' to prevent a wrong being done within its own dominion to another nation with which it is at peace, or to the people thereof; and because of this the obligation of one nation to punish those who within its own jurisdiction counterfeit the money of another nation has long been recognized." 120 U.S. at 484. The nexus of the targeted activity to commerce and to foreign relations is compelling in such counterfeiting, but completely lacking in the domestic violence governed by § 13981.

In the end, *amici* cannot offer a single example where legislation implementing the treaty power has been upheld absent some connection between the conduct regulated and foreign nations, citizens, trade, or property. Wholly domestic matters such as violence between United States citizens occurring entirely within the United States and having no connection to the property or citizens of foreign governments are simply not "proper subjects of negotiation between our government and the governments of other nations." *De Geofroy*, 133 U.S. at 265. The treaty power offers no added authority to regulate such matters.

Finally, while it is unnecessary to review the treaty itself in connection with this case, it is worth noting that the language of the ICCPR would confer virtually unlimited federal authority over a plethora of local matters. According to *amici*, the treaty creates sweeping affirmative rights like a right to the "highest attainable standard of physical and mental health," a right to "just and favorable work conditions," a "right to ... security of the person" and "equality of rights and responsibilities of spouses as to marriage and its dissolution." Brief *Amici Curiae* on Behalf of International Law Scholars and Human Rights Experts, at 8-9 & n. 8 (describing U.N. interpretation of ICCPR). It is unclear what, if anything, these broad platitudes might mean (*e.g.*, universal health care? guaranteed employment? abolition of the death penalty?), or how varying interpretations may be in conflict with legislation enacted by Congress both before and after ap-

proval of the treaty. What is clear, however, is that if these generalities were a source of federal legislative authority, then nothing would be beyond Congress' grasp and we would have the full-blown federal police power repeatedly eschewed by the Framers and by this Court. Nothing in this treaty authorizes or justifies disrupting federalism and the traditional jurisdiction of the States over domestic relations.

CONCLUSION

For the foregoing reasons, the decision of the Fourth Circuit should be affirmed in its entirety.

Respectfully submitted,

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UNITED STATES, *Petitioner*

v.

ANTONIO J. MORRISON AND
JAMES LANDALE CRAWFORD, *Respondents*.

CHRISTY BRZONKALA, *Petitioner*,

v.

ANTONIO J. MORRISON AND
JAMES LANDALE CRAWFORD, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF CLARENDON FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

Pursuant to Rule 37.3 of this Court, Clarendon Foundation respectfully submits this brief *amicus curiae* in support of Respondents.[1] Written consent to the filing of this brief has been granted by all parties. Copies of the letters of consent have been lodged with the Clerk. Clarendon Foundation is a nonprofit, nonpartisan legal foundation concerned with significant issues related to the Constitution and democratic government, particularly in the areas of federalism and separation of powers. Because this case raises questions relating to the proper bounds of federal power, we believe our perspective will complement the briefs of the parties and assist the Court in the resolution of the issues at hand.

INTRODUCTION AND SUMMARY OF ARGUMENT

In its recent report, the American Bar Association's Task Force on the Federalization of Criminal Law concluded that the increase in federal crimes "cover[ing] historically state-prosecuted areas (including essentially local conduct and sometimes street crime) is certainly significant [and] troubling." *The Federalization of Criminal Law* 10-11 (1998). The Report observes that there is an "absence of any underlying principle governing Congressional choice to criminalize conduct under federal law that is already criminalized by state law." *Id.* at 14. This "federalization" of criminal laws threatens to "undermine[] the state-federal fabric and disrupt[] the important constitutional balance of federal and state systems," a balance that would "alter . . . the careful decentralization of criminal law authority that has worked well for all of our constitutional history." *Id.* at 43, 50.

The provision of the Violence Against Women Act ("VAWA") at issue in this case, 42 U.S.C. § 13981(c), creates a private right

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[1] Clarendon Foundation states that no counsel for a party authored this brief in whole or in part, and no person or entity other than Clarendon Foundation made a monetary contribution to the preparation or submission of the brief. SUP. CT. R. 37.6.

of action against any "person . . . who commits a crime of violence motivated by gender." Section 13981(c) is not a criminal statute, although VAWA contains criminal provisions. *E.g.*, 18 U.S.C. § 2261(a)(1) (punishing a person "who travels across a State line . . . with the intent to injure, harass, or intimidate that person's spouse or intimate partner"); § 2262 (punishing "interstate violation of [a] protective order"). There has always been a strong connection between crime and tort in the area of civil rights. Congress has historically provided for both actions. *See* Civil Rights Act of 1875, § 2, ch. 114, 18 Stat. 336 (providing both civil and criminal remedies for civil rights violations); Civil Rights Act of 1871, §§ 2, 6, ch. 22, 17 Stat. 13-14 (same); Civil Rights Act of 1870, §§ 2-4, ch. 114, 16 Stat. 140-41 (same). It makes sense for Congress to do so because "[b]oth crime and tort fit into the larger category of breaches of the king's peace." David J. Seipp, *The Distinction Between Crime and Tort in the Early Common Law*, 76 B.U. L. Rev. 59, 59 (1996). "Crime and tort were different ways for a victim to pursue justice for the same wrongful act." *Id.* at 83. See *also* Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 Yale L.J. 1795, 1803-13 (1992).

While we recognize that Section 13981 does not, strictly speaking, bring the criminal authority of the United States to bear on the defendants-respondents, this brief will focus on the general criminal authority of the United States because the source of that particular authority was of great concern both to the framers of the Constitution and to the framers of the Fourteenth Amendment.[2] Moreover, the constitutional authority for congressionally-defined crime and tort must rest on the same basis. Section 13981 must rest upon the same authority that Congress would have to define and punish the underlying "crime of violence motivated by gender." 42 U.S.C. § 13981(c). *See also United States v.*

[2] Much of the argument that follows has been adapted from Professor Bybee's study of Congress's criminal jurisdiction. Jay S. Bybee, *Insuring Domestic Tranquility:* Lopez, *Federalization of Crime, and the Forgotten Role of the Domestic Violence Clause*, 66 Geo. Wash. L. Rev. 1 (1997).

Cruikshank, 92 U.S. 542, 553-54 (1875) ("It is no more . . . within the power of the United States to punish for a conspiracy to . . . murder within a State, than it would be to punish for . . . murder itself.").

The United States has asserted two sources of constitutional authority for the VAWA: The Commerce Clause (art. I, § 8, cl. 3) and Section 5 of the Fourteenth Amendment. *See* 42 U.S.C. § 13981(a). In Section I, we discuss the deep concern of the framers of the Constitution that the federal government's authority under the Constitution be limited so as not to undermine the states as the primary organs for defining and punishing crime. Commenting on the delicate balance between state and federal governments, Alexander Hamilton thought "the ordinary administration of criminal and civil justice" to be the "one transcendent advantage" the states possessed over the federal government. *The Federalist No.* 17, at 107 (Jacob E. Cooke, ed. 1961). Thus, "[t]he administration of private justice between the citizens of the same state . . . can never be desirable cares of a general jurisdiction." *Id.* at 106. As Chief Justice Marshall later observed, Congress cannot "punish felonies generally." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 246, 428 (1821).

The framers' intentions are evident in the constitutional scheme, in the Preamble; in the grant of express authority to punish treason, counterfeiting, and piracy on the high seas; and in the Domestic Violence Clause (art. IV, § 4), which provides that the "United States . . . shall protect each of [the States] . . . against domestic Violence" following "Application of the Legislature, or of the Executive (when the Legislature cannot be convened)." In establishing the Constitution, the framers intended for the federal government to *insure* domestic tranquility in the states; it was not to *provide* for it, as the government would do for the common defense of the United States.

Section 13981 is contrary to this careful scheme. If the government's theory of the Commerce Clause sustains this Act, then it is indeed "difficult," if not impossible, "to perceive any limitation on federal power" (*United States v. Lopez*, 514 U.S. 549,

564 (1995)). It suggests that "the first dut[y] of government . . . [to] afford . . . protection" (*Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803)) belongs to Congress first and to the states only as a matter of congressional sufferance. It means that the framers really intended for Congress to provide for criminal law protection rather than insure it; that the framers had no reason to give Congress express provision to punish treason, counterfeiting, or piracy; and that the Domestic Violence Clause is not a guarantee to the states of federal support for state law enforcement efforts, but mere surplusage.

Congress has also asserted Section 5 of the Fourteenth Amendment as independent authority for Section 13981. *See* 42 U.S.C. § 13981(a). Even as the framers of the Fourteenth Amendment agreed that Congress should have some power to protect civil rights from unjust state actions, they expressed the same concerns held by the original framers--that Congress not undermine state enforcement of criminal laws.

Section 5 supplies no greater authority for Section 13981 than does the Commerce Clause. The framers of the Fourteenth Amendment rejected Representative John Bingham's proposal that would have given Congress general power to provide for equal protection of all persons. Instead, the framers drafted a Fourteenth Amendment that contains self-enforcing provisions in Section 1. Nevertheless, in Section 5, Congress acquired power to enforce these provisions. Congress may enact "remedial, preventive legislation" (*Boerne v. Flores*, 521 U.S. 507, 531 (1997)), so long as the legislation is proportional and congruent to some putatively unconstitutional state action. *See Florida Prepaid Postsecondary Education Expense Bd. v. College Savings Bank*, 119 S. Ct. 2199 (1999). Congress has been granted the power to enforce violations of equal protection, not to grant protection in the first instance. As Representative James Garfield observed during the civil rights enforcement debates, Congress has power to act when "laws of the State are unequal" or there is "a systematic maladministration of the [the laws], or a neglect or refusal to enforce their provisions." But "when we provide by congressional enactment to punish a

mere violation of a State law, we pass the line of constitutional authority." Cong. Globe, 42d Cong., 1st Sess. app. at 153, 154 (1871).

In Section 13981, Congress has created a general tort remedy. The Act requires no showing that Virginia's laws are unequal, or that there is an inadequate remedy in Virginia for gender-based violence, or that Virginia has refused to enforce its laws in favor of women (or men). Congress's response to the problem of gender-based violence was simply to coopt the field nationally. In debates over an early draft of the Fourteenth Amendment, Senator Stewart pointed out that one means of securing equal protection is "to legislate fully upon all subjects affecting life, liberty, and property, and in this way secure uniformity and equal protection." But if Congress were permitted to do this, he warned, "there would not be much left for the State Legislatures." Cong. Globe, 39th Cong., 1st Sess. 1082 (1866). *See Boerne*, 521 U.S. at 521. As we discuss in Section II, the framers of the Fourteenth Amendment drafted that amendment to give Congress power to address inequities, but rejected the idea that Congress should have the power to legislate fully on all subjects.

ARGUMENT

I. THE FRAMERS OF THE CONSTITUTION GRANTED CONGRESS LIMITED POWER TO DEFINE AND PUNISH CRIME; SECTION 13981 IS CONTRARY TO THE CONSTITUTIONAL SCHEME

As the delegates opened the constitutional convention in May 1787, the question of the states' ability to suppress violence was very much on their minds. Only three months earlier Massachusetts had reestablished order over Shay's Rebellion. That uprising, in which cash-poor farmers facing debtors' courts and prison terms closed the state courts, had threatened the security not only of Massachusetts, but of Maryland, New Jersey, Pennsylvania, South Carolina and Virginia as well. *See* David P.

Szatmary, *Shay's Rebellion: The Making of an Agrarian Insurrection* 123-26 (1980). As Virginia Governor Edmund Randolph welcomed the delegates, he listed among the reasons for convening the convention the inability of the federal government to "check . . . rebellion" in the states and "to interpose according to the exigency." 4 *The Debates in the Several States on the Adoption of the Federal Constitution* 127 (Jonathan Elliot ed., 1836) ("*Elliot's Debates*").

Although the framers anxiously sought support for states that might face insurrection, the framers (and others) were concerned that the new federal government might acquire a general power to adopt its own criminal code, thereby authorizing the United States to assume primary responsibility for violence committed against either citizens or state and local governments. The framers' concerns over Shay's Rebellion and the scope of the new government's power to define and punish crime manifested themselves in three provisions in the Constitution: First, in the Preamble, which declared it the purpose of the United States to insure domestic tranquility; second, in Congress's express powers to punish counterfeiting (art. I, § 8, cl. 6), piracies and felonies on the high seas (art. I, § 8, cl. 10), and treason (art. III, § 3) and to legislate exclusively for the District of Columbia (art. I, § 8, cl. 17) and the territories (art. IV, § 3, cl. 2); and third, in the Domestic Violence Clause, by which the United States "shall protect [the states] . . . on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence" (art. IV, § 4).

A. The Preamble Declared The Purpose Of The Constitution Is To "Insure," Not To "Provide" For, Domestic Tranquility

The Constitution dispelled any doubts that the United States would assume some responsibility for punishing crime. At the same time, it carefully limited the power the United States would exercise. The constitutional scheme can be discerned, quite subtly,

from the Preamble. In contrast to the Articles of Confederation, the new federal government assumed responsibility to wage war, raise armies and navies, direct the militia (art. I, § 8, cls. 11-16; art. II, § 2, cl. 1) and protect the United States against invasion (art. IV, § 4). The states relinquished their right to "engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay" (art. I, § 10, cl. 3), making the federal power over war exclusive. The national government thus assumed the duty to "*provide* for the common defence."

In contrast to its war powers, the United States acquired various powers that it would share concurrently with the states. Guardianship of these powers would assist in the promotion of the "general Welfare." These included the power to tax and spend to that end (art. I, § 8, cl. 1). *See United States v. Butler*, 297 U.S. 1 (1936). Those powers are well suited for Congress to "*promote* the general welfare," although stopping short of demanding that Congress "provide" for it. The framers contemplated that Congress would share the responsibility for promoting the general welfare with the states.

On the other hand, the Constitution did not grant Congress an exclusive power (as it had over war) or general enumerated powers (as it had for spending for the general welfare) to provide for domestic tranquility. The United States obligated itself to protect the states against domestic violence "on Application of the Legislature, or of the Executive (when the Legislature cannot be convened)" (art. IV, § 4). Congress did not assume primary responsibility–whether exclusive or concurrent–for quelling domestic violence. Rather, its responsibility was secondary: The United States was to "*insure* domestic tranquility" when the states, in their own judgment, proved incapable. This scheme by which the federal government would serve to back up the states did not create a perfect union, but only "a more perfect union."

B. The Constitution Granted Congress Limited Power To Punish Crimes Related To Its Enumerated Powers

1. The Enumerated Crimes

The Constitution expressly grants Congress the power to punish three crimes: counterfeiting the securities and current coin of the United States (art. I, § 8, cl. 6), piracies and felonies committed on the high seas (art. I,§ 8, cl. 10), and treason (art. III, § 3, cl. 3).[3] The Constitution also granted Congress exclusive power over the District of Columbia (art. I, § 8, cl. 17) and over federal territories and property (art. IV, § 3, cl. 2), locations in which no state would be competent to administer its criminal law. To these the Necessary and Proper Clause potentially added uncertain powers to Congress to define and punish crimes related to "all other Powers vested . . . in the Government of the United States" (art. I, § 8, cl. 18).

The question that naturally arose from the enumeration of these crimes was whether they constituted the complete federal domain over crime. In the Virginia convention, for example, Patrick Henry, who opposed ratification, argued that "congress, from their general powers, may fully go into business of human legislation. They may legislate, in criminal cases, from treason to the lowest offence–petty larceny. They may define crimes and prescribe punishments." 3 *Elliot's Debates, supra*, at 447. To this George Nicholas responded that the enumerated powers doctrine barred Congress from defining any crimes not enumerated.

> [Mr. Henry] says that, by this Constitution, [Congress has] power to make laws to define crimes and prescribe punishments; . . . Treason against the United States is defined in the Constitution . . . . Congress have power to define and punish piracies and felonies committed on the high seas, and offences against the laws of nations; but they cannot define or

[3] In addition, the Constitution refers to the crime of bribery and "other high Crimes and Misdemeanors" (art. II, § 4), although it does not expressly grant Congress the power to define or punish such crimes.

> prescribe the punishment of any other crime whatever, without violating the Constitution. . . . [William Grayson] says that the power of legislation includes every thing. A general power of legislation does. But this is a special power of legislation. Therefore, it does not contain that plenitude of power which he imagines. They cannot legislate in any case but those particularly enumerated.

Id. at 451. In one of the earliest commentaries on the Constitution, St. George Tucker supported Nicholas' argument: "[Congress is] not entrusted with a general power over [the subject of crimes and misdemeanors], but a few offences are selected from the great mass of crimes . . . . All felonies and offences committed upon land, in all cases not expressly enumerated, being reserved to the states respectively." 1 St. George Tucker, *Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia* app. 414-15 (1803).[4]

Alexander Hamilton expressed a different concern from Patrick Henry, but demonstrated his general agreement with Henry's detractors that Congress could not assume a general power superior to the states to punish crime. Hamilton thought the states privileged over the federal government because they retained control over criminal law enforcement. "It will always be far more easy for the State governments to encroach upon the national authorities, than for the national government to encroach upon the State authorities." The "proof of this proposition" rested on the "greater degree of influence" exercised by the states and evidenced by "one transcendent advantage"–"the ordinary administration of

[4] The argument was made again by Thomas Jefferson in the Kentucky Resolutions, written in protest of the Alien and Sedition Acts. Referring to the enumerated crimes and quoting the Tenth Amendment, Jefferson wrote that the Sedition Act "(and all other acts which assumed to create, define, or punish crimes other than those enumerated in the Constitution,) are altogether void, and of no force; and that the power to create, define, and punish, such other crimes is reserved, and of right appertains, solely and exclusively, to the respective states, each within its own territory." Thomas Jefferson, Kentucky Resolutions of 1798 and 1799, *reprinted in* 4 *Elliot's Debates*, *supra*, at 540.

criminal and civil justice." *The Federalist No.* 17, at 106, 107 (Jacob E. Cooke, ed. 1961). Because of the relative advantage of the states in this regard, "[t]he administration of private justice between the citizens of the same state . . . . can never be desirable cares of a general jurisdiction." *Id.* at 106. Hamilton thought that "regulating all those personal interests and familiar concerns to which the sensibility of individual is more immediately awake" was the "great cement of society" and made of the states "a complete counterpoise and not unfrequently dangerous rivals to the power of the Union." *Id.* at 107-08.

2. The Necessary and Proper Clause

A month after the constitutional convention, Colonel George Mason wrote George Washington to explain his objections to the proposed Constitution, including his concern that the Necessary and Proper Clause might permit Congress to "constitute new crimes." *Pamphlets on the Constitution of the United States* 331 (1968). "An Impartial Citizen" of Virginia answered Colonel Mason's argument directly: "It is also objected by Mr. Mason, that under [the Federalists'] own construction of the general clause, at the end of the enumerated powers, the Congress may grant monopolies in trade, constitute new crimes, inflict unusual punishments, and, in short, do whatever they please." For the "Impartial Citizen," "[n]othing can be more groundless and ridiculous than this. . . . [T]he laws which Congress can make, for carrying into execution the conceded powers, must not only be *necessary*, but *proper*–So that if those powers cannot be executed without the aid of a law . . . creating new crimes . . . as such a law would be manifestly *not proper*." *An Impartial Citizen V, On the Federal Constitution* (Feb. 28, 1788), *reprinted in* 8 The Documentary History of the Ratification of the Constitution 431 (Kaminski & Saladino eds., 1988). *See United States v. Printz*, 521 U.S. 898, 923-24 (1997).

Any notion that Congress had power only over the enumerated crimes was dispelled by the First Congress. In 1790, Congress

adopted an "Act for the Punishment of certain Crimes against the United States" (Act of April 30, 1790, ch. 9, 1 Stat. 112). Fulfilling the mandate of Article I, Section 8, Congress defined and punished treason, piracy and counterfeiting. It also defined crimes in places under the sole jurisdiction of the United States and further defined certain crimes related to federal activities, including the misprision of federal felonies, receiving goods stolen in contravention of U.S. law, perjury, bribery of judges, and obstruction of process.

While the Act of 1790 demonstrated that Congress intended to use the Necessary and Proper Clause to define crimes not expressly provided for in the Constitution, the early list of federal crimes was not a strong assertion of federal control of crime. These early crimes (like the Sedition Act, Act of July 14, 1798, ch. 74, 1 Stat. 596) punished acts against the government. Any crime may be understood as a challenge to the ability of the government to protect its citizens and to maintain the peace, but the early federal crimes punished those actions that challenged the government directly. It was not until after the Civil War that Congress enacted the first laws intended to protect individuals, rather than government. *See* Sara Sun Beale, *Federal Criminal Jurisdiction*, in 2 Encyclopedia of Crime and Justice 775-76 (Kadish, ed. 1983); Martin Conboy, *Federal Criminal Law*, in 1 Law: A Century of Progress, 1835-1935, at 311-24 (Reppy, ed. 1937).

During this early period, the Court had few opportunities to address the question of Congress's power to define and punish crime, but the Court's pronouncements did not depart from the sense that Congress could define crimes "necessary and proper" beyond the three enumerated crimes, and that Congress lacked a general power over crime. In *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), the Court inferred from Congress's power "[t]o establish Post Offices and post Roads," that Congress had the power "to punish those who steal letters from the post-office, or rob the mail." Chief Justice Marshall thought the "power of punishment appertains to sovereignty, and may be exercised, whenever the sovereign has a right to act, as incidental to his constitutional powers." *Id.* at 417. In *United States v. Hudson &*

Goodwin, 11 U.S. (7 Cranch) 32 (1813), the Court held that federal courts did not have jurisdiction over common law crimes. "The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence." *Id.* at 34. *See also Liparota v. United States*, 471 U.S. 419, 424 (1985) ("The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute."); *United States v. Reese*, 92 U.S. 213, 216 (1876) ("If Congress has not declared an act done within a State to be a crime against the United States, the Courts have no power to treat it as such."). In *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821), the Court confirmed that Congress must have an express source of authority to create a federal crime and that no provision granted to Congress a "general right to punish murder committed within any of the States." Congress "cannot punish felonies generally." *Id.* at 426, 428.

C. The Domestic Violence Clause Confirmed Congress's Lack Of Authority To Define and Punish Crimes Generally

The early framers also cited the Domestic Violence Clause (art. IV, § 4) as evidence that Congress had charge of the external police for the United States, but that ordinary police matters belonged to the states. The Constitution grants Congress the power to "call[] forth the Militia to execute the laws of the Union, suppress Insurrections and repel Invasions," (art. I, § 8, cl. 15). In Article IV the Constitution also empowers the United States to protect the states against "Invasion." That section, however, did not give the United States the power to protect the states against "insurrections," as we might have expected. The framers substituted the broader phrase "domestic violence" for the term "insurrection" and they added a condition.

According to its authors, the term "domestic violence" included "dangerous commotions, insurrections and rebellions." 2 *The*

Records of the Federal Convention of 1787, at 47 (Max Farrand ed., rev. ed. 1937) (statement of James Wilson). The Attorney General has since advised that the constitutional phrase "domestic violence" includes "robbery, burglary, arson, rape, and murder" and has affirmed that "each State of the Union has the right to protect itself against domestic violence, and to invoke to that end the friendly cooperation, or at least the neutrality, of the United States." Yazoo City Post Office Case, 8 Op. Att'y Gen. 489, 494, 497 (1857). *See also* U.S. Dep't of Justice, The Use of Military Force Under Federal Law to Deal with Civil Disorders and Domestic Violence (1980).

The framers conditioned the exercise of federal power over domestic violence on the states requesting federal assistance. And the Constitution is quite specific that the request must come from the state legislature, unless it cannot convene, in which case a request from the governor will be sufficient. Although the Domestic Violence Clause at first appears to grant Congress power to suppress domestic violence, the clause is quite limited because Congress can intervene only when, *in the state's judgment*, the situation requires it. The Domestic Violence Clause thus shields the states from unwanted federal intervention. In the Virginia ratifying convention, Mr. Clay worried that the clause would permit the national government to intervene on the merest pretext of violence in a state. 3 *Elliot's Debates*, *supra*, at 407. Edmund Pendleton, President of the Virginia ratifying convention, stated that the Clause was more "a restraint on the general government not to interpose. The state is in full possession of the power of using its own militia to protect itself against domestic violence; and the power in the general government cannot be exercised, or interposed, without the application of the state itself." 3 *Elliot's Debates*, *supra*, at 441. *See also id.* at 408-25 (arguments of Patrick Henry, James Madison and others).

Although the immediate effect of the Domestic Violence Clause was to authorize federal assistance to the states, upon their request, to avoid future situations such as Shay's Rebellion, the framers and earliest commentators imputed to the Clause a secondary meaning:

That Congress could not supplant the states as the primary organ for criminal law. That is, if Congress could not intervene against the wishes of the state to suppress domestic violence, neither could it accomplish the same thing indirectly by legislating a criminal code for the states and then enforcing the code as federal law.[5] "Brutus" stated the general principle:

> The *protection and defence* of the community is not intended to be entrusted *solely* into the hands of the general government .... But it ought to be left to the state governments to provide for the protection and defence of the citizen against the hand of private violence, and the wrongs done or attempted by individuals to each other–Protection and defence against the murderer, the robber, the thief, the cheat, and the unjust person, is to be derived from the respective state governments. ... The preservation of internal peace and good order, and the due administration of law and justice, ought to be the first care of every government.

Essays of Brutus (VII) (Jan. 3, 1788), *reprinted in, The Complete Anti-Federalist* 400-01 (Storing, ed. 1981).

The earliest commentators argued that the condition imposed by the Domestic Violence Clause was necessary "otherwise the self-government of the state might be encroached upon at the pleasure of the Union." William Rawle, *A View of the Constitution* 299 (2d ed. 1829). Joseph Story, following St. George Tucker, believed

[5] These concerns were nearly realized in the Whiskey Rebellion of 1794. After President Washington sent federal troops to Pennsylvania to quash armed resistence to federal revenue laws, Pennsylvania's governor protested that Pennsylvania's resources were adequate to suppress the riots. Secretary of State Randolph responded that the United States had authority to "support their own authority" and added that the U.S. had to "preserve the character of Republican Government, by evincing that it has adequate resources for maintaining the public order." 4 Annals of Congress app. at 2832 (1796). Although the United States had the power to enforce its revenue laws, from Pennsylvania's perspective the greatest threat to its republican form of government was direct federal intervention. *See* Leland D. Baldwin, *Whiskey Rebels: The Story of a Frontier Uprising* 184 (1939) ("[Pennsylvania] state officials were silent, probably each reminded of the prophecy that the federal government would swallow up the states and interpreting [Washington's] proposal as a step in that direction.").

that "every pretext for intermeddling with the domestic concerns of any state, under colour of protecting it against domestic violence, is taken away [by the Domestic Violence Clause]." 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1819, at 684-85 (1833). *See also* Thomas M. Cooley, *General Principles; of Constitutional Law in the United States of America* 198 (1880); 1 Tucker, *supra*, app. at 367.

D. Upholding Section 13981 As An Exercise Of The Commerce Power Would Be Inconsistent With The Constitutional Design

What the text and the historical records evidence is the singular resolve of the framers to grant Congress the power to enforce those matters uniquely entrusted to the federal government, but at the same time, not to entrust to Congress the general authority to maintain domestic peace. They determined not to undermine the states and to avoid creating in the federal government a national criminal code, with the concomitant need for a national police force. *See Terminiello v. Chicago*, 337 U.S. 1, 34-35 (1949) (Jackson, J., dissenting). As the Office of Legal Counsel described the balance between federal and state criminal law,

> The present posture of criminal law in the United States is consistent with that intended by the Founding Fathers: the States retain jurisdiction over crimes committed within the State which are local in nature; the Federal Government has jurisdiction over certain crimes that involve interstate commerce, taxes, assaults on Federal and foreign officials, and the like.

Use of Potatoes to Block the Maine-Canada Border, 5 Op. Off. Legal Counsel 422, 423 (1981).

The framers recognized that protection is the first duty of every government. Indeed, the fundamental privileges belonging to the citizens of the United States begin with "protection by the Government." *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3230). "One of the first duties of government," the

Court said in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803), is to "afford . . . protection." *See United States v. Cruikshank*, 92 U.S. 542, 550-51 (1875); *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 76 (1872). As Hamilton stated, the administration of criminal and civil justice was "the visible guardian of life and property" and "contributes more than any other circumstance to impressing upon the people affection, esteem and reverence towards the government." *The Federalist No.* 17, at 107 (Jacob E. Cooke, ed. 1961).

So carefully ingrained was the principle, that its corollary was nearly as obvious: a government that cannot or will not protect its citizens is not a government that can expect to remain sovereign. The relationship between them is one of mutual consideration. The government provides protection, and its citizens return their loyalty. *See Calvin's Case*, 7 Coke's Rep. 1, 4b-5a ; 77 Eng. Rep. 382 (1609) ("for as the subject oweth to the King his true and faithful ligeance and obedience, so the sovereign is to govern and protect his subjects"); 1 William Blackstone, *Commentaries on the Laws of England* *47-48 (George Sharswood ed. 1860) ("the community should guard the rights of each individual member, and . . . (in return for this protection) each individual should submit to the laws of the community"). Perhaps the two most influential state constitutions of the founding period made protection the essence of government and loyalty the duty of its citizens. The Virginia Declaration of Rights stated that "government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community" (Va. Decl. of Rights § 3 (1776), *reprinted in* 2 Benjamin Perley Poore, *The Federal and State Constitutions, Colonial Charters and Other Organic laws of the United States* 1908 (2d ed. 1878)), while the Pennsylvania Constitution declared that its citizens professed their allegiance "in consideration of protection only" (Pa. Const. of 1776, *reprinted in* Poore, *supra*, at 1540). To the degree the federal government assumes responsibility for our protection, it is entitled to our loyalty, and when it becomes our sole protector, it becomes the object of our undivided loyalty.

It is too late to contest that crime, including gender-based acts such as rape, does not have an impact on the economy. The toll for crime, measured in human suffering, social upheaval, lost opportunities, and financial losses, is heavy indeed. But the burdens of "domestic violence"–as understood in the Constitution and defined by the Attorney General as "robbery, burglary, arson, rape, and murder" (8 Op. Att'y Gen. at 494)–have always been present, and yet the framers adamantly maintained that the Constitution did not dethrone the states as the primary source of criminal laws and torts.

If we accept the government's position–a position that plainly draws support from cases such as *Perez v. United States*, 402 U.S. 146 (1971); *Daniel v. Paul*, 395 U.S. 298 (1969); and *Wickard v. Filburn*, 317 U.S. 111 (1942)–the Commerce Clause will have become an inexhaustible font for federal criminal laws and torts. It will be "difficult to perceive any limitation on federal power . . . [in] criminal law enforcement" (*Lopez*, 514 U.S. at 564). The Commerce Clause will have swallowed the carefully written Domestic Violence Clause. And it will authorize Congress to do precisely what the framers denied would be possible–"punish felonies generally" (*Cohens*, 19 U.S. (6 Wheat.) at 428) and "administ[er] . . . private justice between the citizens of the same states" (*The Federalist No.* 17, at 107).

II. THE FRAMERS OF THE FOURTEENTH AMENDMENT DID NOT GRANT CONGRESS A GENERAL POWER TO PROVIDE EQUAL PROTECTION OF LAW, BUT A LIMITED POWER TO REMEDY STATE VIOLATIONS OF THAT CLAUSE

Even if Congress does not have power to enact Section 13981 under its Article I powers, Congress also has asserted Section 5 of the Fourteenth Amendment as an independent source of authority. In this section, we demonstrate that although the framers of the Fourteenth Amendment were concerned–justifiably–with the equal protection of the laws in the states, the Fourteenth Amendment did

not grant Congress the power to adopt criminal laws for the general protection of people; rather, in Section 5, it secured the power to enforce the requirement in Section 1 that state protection of the laws be offered equally. Congress's power under Section 5 is the power to correct unconstitutional state action, not the power to supplant the states.

A. The Framers Of The Fourteenth Amendment Carefully Considered And Then Expressly Rejected John Bingham's Proposed Amendment Granting Congress General Power Over Equal Protection Of Law

1. The Debates Over the Bingham Amendment

In early 1866, shortly after ratification of the Thirteenth Amendment, Congress began work on three important pieces of reconstruction legislation: the Freedmen's Bureau Bill, the Civil Rights Act of 1866, and the Fourteenth Amendment. Both the Freedmen's Bureau Bill and the Civil Rights Act incorporated controversial criminal provisions. Section 8 of the Freedmen's Bureau Bill made it a misdemeanor to deprive persons of their civil rights on the basis of race, color, or previous condition of servitude. S. 60, 39th Cong., § 8 (1866). Section 2 of the Civil Rights Act made it a misdemeanor for a person, under color of law, to deprive an inhabitant of any State or Territory of civil rights enumerated in the Act. Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27. President Andrew Johnson vetoed both bills. *See* Cong. Globe, 39th Cong., 1st Sess. 915-17, 1679-81 (1866). In his veto message returning the Civil Rights Act, the President explained that the bill would preempt state law: In the "vast domain of criminal jurisprudence, provided by each State for the protection of its own citizens, and for the punishment of all persons who violate its criminal laws, Federal law, wherever it can be made to apply, displaces state law." *Id.* at 1680. Congress overrode the veto with respect to the Civil Rights Act, but not the return of the Freedmen's Bureau Act. Nevertheless, members of Congress had

lingering doubts over the constitutionality of the civil rights legislation and renewed their efforts to secure an amendment to the Constitution.

In February 1866, Representative John Bingham, a member of the Joint Committee on Reconstruction, proposed a new amendment:

> **Article __.** The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.

Cong. Globe, 39th Cong., 1st Sess. 1034 (1866). Despite Bingham's assurance that the proposed amendment did not "take away from any State any right that belongs to it" (*id.* at 1088), he admitted that under his proposal Congress would have the power to make laws equal. *Id.* at 1093-94. Republican Representative Robert Hale warned that under Bingham's Amendment, "all State legislation, in its codes of civil and criminal jurisprudence and procedures . . . may be overridden, may be repealed or abolished, and the law of Congress established instead" (*id.* at 1063). Senator Stewart argued that the only way to make the laws equal was to make them uniform.

> The only way this could be accomplished, would be for Congress to legislate fully upon all subjects affecting life, liberty, and property, and in this way secure uniformity and equal protection to all persons in the several States. When this was done, there would not be much left for the State Legislatures.

Id. at 1082. Bingham's amendment faced formidable opposition in the House and was tabled permanently in February 1866. *See Boerne*, 521 U.S. at 521-22.

In May 1866, a revised amendment was introduced which, with little recorded discussion, was adopted by Congress and ratified by the states. Although Bingham's first proposed amendment had not survived, the contrast between his failed amendment and the

Fourteenth Amendment continued to be a source of controversy during the civil rights enforcement debates.

2. The Civil Rights Enforcement Act Debates

Beginning in 1870, Congress enacted a number of laws creating civil remedies in tort and criminal offenses against persons who deprived others of their civil and political rights. Some of these provisions were directed at persons who acted under color of state law or attempted to interfere with official actions. Civil Rights Act of 1871, ch. 22, 17 Stat. 13, codified in part, as amended, at 42 U.S.C. § 1983 (providing a cause of action against persons acting "under color of state law"), § 1985 (providing a cause of action against persons conspiring to interfere with federal officials, court proceedings, or federal privileges or immunities); Act of May 31, 1870, ch. 114, 16 Stat. 140, codified in part, as amended, at 42 U.S.C. §§ 1987, 1990 (punishing federal officials who refused to serve process). Other provisions created crimes or tort actions against private persons. *See, e.g.* Act of March 1, 1875, ch. 114, 18 Stat. 335 (making it a misdemeanor to deny equal enjoyment of public accommodations and granting private parties the right to recover a civil fine).[6]

The debates over these acts, in particular, the Ku Klux Klan Act or Civil Rights Act of 1871, focused directly on the question of what power Congress had under the Constitution, including the new Fourteenth Amendment, to punish crime committed by private persons.[7] Representatives John Bingham and Samuel Shellabarger asserted that Congress's power to enact the Ku Klux Klan Act rested on Section 5 of the Fourteenth Amendment (Cong. Globe,

[6] The latter provision was held unconstitutional in *The Civil Rights Cases*, 109 U.S. 3 (1883)).

[7] There is, perhaps, less agreement among the framers of the Fourteenth Amendment over this point than there was among the framers of the original Constitution. With few exceptions, however, the framers of the Fourteenth Amendment agreed that the states remained the primary source of criminal law.

42d Cong., 1st Sess. app. at 69, 83 (1871)), and that Congress was enforcing the Privileges or Immunities Clause and the Equal Protection Clause. They pointed out that among the privileges and immunities of citizens was what Justice Washington had described in *Corfield v. Coryell*, as "[p]rotection by the Government" (6 F. Cas. at 551). Bingham argued that the Reconstruction Amendments "vest[ed] in Congress a power to protect the rights of citizens against States, and individuals in States, never before granted." Cong. Globe, 42d Cong., 1st Sess. app. at 83 (1871). Indeed, Bingham went so far as to assert that the Fourteenth Amendment, as adopted, was "more comprehensive than as it was first proposed and reported in February, 1866. It embraces all and more than did the February proposition." *Id.* app. at 83.[8]

Although some of the framers of the Fourteenth Amendment continued the arguments of an earlier generation that Congress had no jurisdiction over crime except in federal territories and over enumerated matters,[9] others took a more pragmatic view. Among the more prudent participants was Ohio Republican James Garfield. Representative Garfield offered a careful comparison of the Bingham proposal and the Fourteenth Amendment adopted by Congress and ratified by the states. Bingham's "proposed amendment was a plain, unambiguous proposition to empower Congress to legislate directly upon the citizens of all the States in regard to their rights of life, liberty, and property." Instead, the Fourteenth Amendment:

> exerts its force directly upon the States, laying restrictions and limitations upon their power and enabling Congress to enforce these limitations. The [Bingham proposal] would have brought the power of Congress to bear directly upon the citizens, and contained a clear grant of power to Congress to

[8] Bingham's claim was, of course, rejected by this Court in *Boerne*. 521 U.S. at 523.

[9] *See, e.g.*, Cong. Globe, 42d Cong., 1st Sess. app. at 50 (1871) (statement of Rep. Kerr); *id.* app. at 86-87 (statement of Rep. Storm); *id.* app. at 187 (statement of Rep. Willard); *id.* app. at 207 (statement of Rep. J. Blair); *id.* app. at 313 (statement of Rep. Burchard).

> legislature directly for the protection of life, liberty, and property within the States. The [Fourteenth Amendment] limited but did not oust the jurisdiction of the State over these subjects. The [Bingham proposal] gave Congress plenary power to cover the whole subject with its jurisdiction . . . to the exclusion of the State authorities.

Id. app. at 151.

During the civil rights debates, Garfield suggested that Section 1 of the Fourteenth Amendment could be enforced through Section 5, including criminal sanctions. *See id.* app. at 153. What troubled Garfield, however, was that the Fourteenth Amendment seemed to limit Congress's enforcement of Section 1 to circumstances when the "laws of the State are unequal" or there is "a systematic maladministration of [the laws], or a neglect or refusal to enforce their provisions"(*id.).* When this state of affairs was "clearly made out," the Fourteenth Amendment authorized congressional response. The problem was that one section of the Ku Klux Klan Act "propose[d] to punish citizens of the United States for violating State laws. This would virtually abolish the administration of justice under State law. . . . [W]hen we provide by congressional enactment to punish a mere violation of a State law, we pass the line of constitutional authority" (*id.* app. at 154).

As Representative Garfield pointed out, the mere fact of crime cannot prove that the states have failed to protect their citizens. If that were the case, then *every* crime could be characterized as a state's failure to provide protection, and Congress's authority would be nearly unlimited. *Id.* app. at 154. Illinois Representative John Farnsworth remarked that the Ku Klux Klan Act "assumes that an unlawful act of some of its citizens is the act of the State." *Id.* app. at 116. Garfield was quite clear that the Fourteenth Amendment did not authorize Congress to act on the pretext of providing equal protection:

> It is not required that the laws of a State shall be perfect. They may be unwise, injudicious, even unjust; but they must be equal in their provisions . . . . The laws must not only be equal on their face, but they must be so administered that equal

> protection under them shall not be denied to any class of citizens, either by the courts or the executive officers of the State.

Id. app. at 153. *See also* Cong. Rec., 43d Cong., 1st Sess. app. 244 (1874) (statement of Sen. Norwood) ("until a State shall attempt to abridge [a citizen's] rights, Congress has no power to act"). These statements merely confirmed what Senator Jacob Howard said as he introduced the redrafted Fourteenth Amendment: The new amendment would be a "restrain[t] [on] the power of the States . . . [and] not powers granted to Congress." Cong. Globe, 39th Cong., 1st Sess. 2766 (1866). As Senator Howard read Section 5 together with Section 1, "[i]t enables Congress, in case the States shall enact laws in conflict with the principles of the amendment, to correct that legislation by a formal congressional enactment" (*id.* at 2768). *See also* Cong. Globe, 42d Cong., 1st Sess. app. 160 (1871) (statement of Rep. Golladay).

3. The Debates Over the Domestic Violence Clause.

Just as it had in the earliest arguments over the scope of Congress's power to punish crime, the Domestic Violence Clause also figured in the debates over the constitutionality of the civil rights enforcement acts.[10] Both sides in the debate claimed support from the Domestic Violence Clause. Some of the supporters of the Ku Klux Klan Act recognized that the Domestic Violence Clause authorized the United States to intervene to suppress domestic violence only upon the invitation of the states, but argued that the Fourteenth Amendment authorized the United States to intervene when there was evidence that a state had failed to protect its

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[10] Congress ultimately provided in Section 3 of the Act that "when insurrection, domestic violence, unlawful combinations, or conspiracies" demonstrated that state officials were "unable to protect" or "refuse[d] protection" to the "rights, privileges, or immunities," of a "class of people," then the president was authorized to suppress the insurrection or domestic violence. Civil Rights Act of 1871, ch. 22, § 3, 17 Stat. 14, codified, as amended at 10 U.S.C. § 333. Congress has declared that when these conditions are met "the State shall be considered to have denied the equal protection of the laws" (10 U.S.C. § 333).

citizens. They claimed that the mere fact of crime was sufficient to justify federal intervention under the guise of the Fourteenth Amendment. *See id.* app. at 72-73 (statement of Rep. A. Blair); *id.* app. at 79 (statement of Rep. Perry).

By contrast, other supporters of the Act were careful to note that the Fourteenth Amendment required proof that "the State fails to give protection." *Id.* at 501-02 (statement of Sen. Frelinghuysen). *See id.* at 604 (statement of Sen. Pool); *id.* app. at 71 (statement of Rep. Shellabarger). Thus, Senator Frelinghuysen emphasized that the United States might intervene "only to guaranty rights and protection when the State fails." The United States "acts in its national character, and not municipally. It does not interfere with the State government . . . . The United States neither makes nor executes a criminal code. The framework of our Government, reserving municipal government to the States and national jurisdiction to the General Government, is not disturbed." *Id.* at 502.

Opponents of the Act did not deny that Congress had the power to prescribe laws when states denied equal protection, but they disputed that the Fourteenth Amendment justified intervention upon a simple showing that there was crime within a state. If such a proof sufficed to demonstrate a denial of equal protection, some members argued, then the Domestic Violence Clause had been repealed, *sub silentio*, by the Fourteenth Amendment. "[M]urder, manslaughter, larceny, [and] any substantive crime" were not within the jurisdiction of Congress. *Id.* app. at 207 (statement of Rep. J. Blair). The "further evidence" (*id.*) of this was the Domestic Violence Clause, which ensured against "the pretense" that the United States might "declare that State governments had failed to protect [their citizens]" and intervene in state affairs. *Id.* app. at 117 (statement of Sen. F. Blair). Protection against such federal pretense was "not repealed or modified by the fourteenth amendment." *Id.* app. at 49 (statement of Rep. Kerr). An implied repeal was contrary to the plain language of the Domestic Violence Clause, which some members regarded as a reservation of state authority over crime. *Id.* at 331 (statement of Rep. Morgan); *id.* at

574 (statement of Sen. Stockton); *id.* app. at 221 (statement of Sen. Thurman); *id.* app. at 207 (statement of Rep. J. Blair); *id.* app. at 160 (statement of Rep. Golladay); *id.* app. at 117 (statement of Sen. F. Blair); *id.* app. at 49 (statement of Rep. Kerr).

B. The Court's Early Decisions Under Section 5 Recognized The Limits Of Congress's Authority To Address Crime And Preserved The Role Of The Domestic Violence Clause; These Decisions Should Govern Section 13981 As Well

The Court's earliest tests of Section 5 limited Congress's authority to define and punish crime in the states and, as a consequence, preserved the role of the Domestic Violence Clause. *See The Civil Rights Cases*, 109 U.S. 3 (1883); *United States v. Harris*, 106 U.S. 629 (1882). In *Harris*, the Court struck down the criminal conspiracy section of the Ku Klux Klan Act, which punished conspiracies to deprive persons of their privileges or immunities or their rights to equal protection and due course of justice. The Act applied to private persons as well as public officials. The Court explained that Congress lacked power under the Fourteenth Amendment to reach private conduct.

> When the State has been guilty of no violation of [the Fourteenth Amendment]; when it has not made or enforced any law abridging the privileges or immunities of citizens of the United States; when no one of its departments has deprived any person of life, liberty, or property without due process of law, or denied to any person within its jurisdiction the equal protection of the laws . . . the amendment imposes no duty and confers no power upon Congress.

106 U.S. at 639. The language in *Harris* could apply with equal force to Section 13981(c). Section 13981 "is not limited to take effect in case the State [violates the Fourteenth Amendment]"; it "applies, no matter how well the State may have performed its duty" (106 U.S. at 639). As in *Harris*, Section 13981 "is directed exclusively against the action of private persons, without reference

to the laws of the State or their administration by her officers," a provision the *Harris* Court concluded "not warranted by any clause in the Fourteenth Amendment" (*id.* at 640).

Similarly, in *The Civil Rights Cases*, the Court struck down a provision of the Civil Rights Act of 1875 prohibiting discrimination in "places of public amusement," whether publicly or privately operated. The Court concluded that Congress had exceeded its authority under Section 5. "[U]ntil some State law has been passed, or some State action through its officers or agents has been taken," Congress has no power to act. 109 U.S. at 13. The Court's description of the Civil Rights Act of 1875 applies with equal force to Section 13981:

> It does not profess to be corrective of any constitutional wrong committed by the States . . . . It applies equally to cases arising in States which have the justest laws respecting the personal rights of citizens . . . . [I]t steps into the domain of Civil jurisprudence and lays down rules for the conduct of individuals in society towards each other, and imposes sanctions for the enforcement of those rules, without referring in any manner to any supposed actions of the State or its authorities.

Id. at 14. To concede to Congress the power to meet every "mischief and wrong" would "cover the whole domain of rights," establishing "a code of municipal law regulative of all private rights between man and man in society. It would be to make Congress take the place of the State legislatures and to supersede them" (*id.* at 13).

* * * * *

These materials demonstrate that the framers of both the original Constitution and the Fourteenth Amendment were keenly aware of the importance to every government to protect persons within its jurisdiction. There is a role for federal criminal law, but federal interests must, necessarily, be distinct from those of the states. As the Congress, step by step, assumes the responsibility for defining, punishing, and redressing every wrongful act, Congress has tread

on ground that has not been granted to it and that is reserved to the states. It tempts the states into resignation, acquiescence and, ultimately, inaction. It threatens the states with atrophy of the function that makes them states.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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UNITED STATES OF AMERICA,
Petitioner,

v.

ANTONIO J. MORRISON, *et al.*,
Respondents.

CHRISTY BRZONKALA,
Petitioner,

v.

ANTONIO J. MORRISON, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR THE STATE OF ALABAMA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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STATEMENT OF *AMICUS* INTEREST

Every branch of government but one supported passage of the Violence Against Women Act of 1994 ("VAWA"), Pub. L. No. 103-322, § 40302, 108 Stat. 1902, 1941 (codified at 42 U.S.C. § 13981). At the national level, overwhelming bi-partisan majorities in the Senate and House promoted the legislation, and so did the President. At the local level, most States supported the measure, and now 36 of them conspicuously advance its constitutionality here. Just one glance at the types of crimes covered by this law, aptly illustrated by the egregious allegations in this case, *see* U.S. Br. 11-12, explains why.

Yet it is precisely the utter depravity of these local crimes that makes national regulation of them neither necessary nor proper. No sane public official of any sort today — elected or unelected, local or national, democrat or republican, prosecutor or legislator — would stand in the way of full and complete remedies for such shameless acts. The very nature of the crime provides all the assurance anyone needs that it will not go unremedied — at least to the extent public officials have any say in the matter.

In submitting this *amicus curiae* brief, then, the State of Alabama does not take issue with the commendable policy considerations that motivated the political branches of government to act. It does not disagree with the policy concerns specifically raised by her sister States in their brief. *See* Brief *Amici Curiae* of Arizona, *et al.* And it does not contest any other component of VAWA save the discrete civil-remedy provision challenged here. *See* 42 U.S.C. § 13981. Gender-motivated violence, it is clear, has no place in our society. And, if there were doubt on this score, we would be tempted to ignore the constitutional defects in this provision rather than acknowledge them and, in so doing, be compelled to support the invalidation of this law. But no such doubt exists. As the Appendix to this brief illustrates, every State in the country offers a tort remedy for crimes like this one, along

with a host of other remedial and enforcement provisions designed to root out precisely the types of misogynistic — in truth, misanthropic — acts that were the prologue to this law and to the allegations in this case.

Moreover, to the extent enforcement gaps still exist in this area of the law, they stem not from any shortage of political conviction but from constitutional limits on the remedies the States may provide and on the policy initiatives they may undertake to address the societal problems that prompt human beings so to treat one another. Indeed, if Alabama had its way when it comes to punishing crimes like these, the mere threat of a civil remedy would be the least of a defendant's worries. The same is true of other States. State officials, to say nothing of federal officials, are more prone today zealously to over-enforce criminal laws than sheepishly to under-enforce them. Nor does this federal remedy address perhaps the most glaring enforcement problem in this area, namely the reticence of many crime victims to pursue tort or criminal remedies at all. Regrettably, however, a victim unwilling to pursue an existing State-law tort remedy is no more likely to pursue a parallel Federal one in its stead.

In the end, the nearly-unanimous showing of governmental support for this provision and the nationwide commitment to bringing such wrongdoers to heel not only casts doubt on the alleged shortage of national resolve regarding this issue, but also underscores the Court's essential role in judicially reviewing such popular laws. Federalism, as this case aptly proves, is no less a counter-majoritarian right than the Constitution's other structural guarantees of liberty.

"Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

For many of the same reasons that the Court has not hesitated to preserve the horizontal separation of powers in a series of cases invalidating widely-supported national measures, *see, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), *INS v. Chadha*, 462 U.S. 919 (1983), *Bowsher v. Synar*, 478 U.S. 714 (1986), *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), it has not refrained from preserving a vertical separation of powers between the National government and the States and from doing so in the context of equally popular measures. Congressional efforts to protect religious liberties, *City of Boerne v. Flores*, 521 U.S. 507 (1997), to regulate guns in the vicinity of schools, *United States v. Lopez*, 514 U.S. 549 (1995), to regulate the disposal of nuclear waste, *New York v. United States*, 505 U.S. 144 (1992), and to provide money-damages relief for overtime work, *Alden v. Maine*, 119 S. Ct. 2240 (1999), all have been reigned in by the constitutionally-required balance between the dual sovereigns and the enduring check of judicial review. Today's law is no different — both in its widespread support and in its improper assumption of power.

As these cases forever teach, the National Legislature does not advance the cause of liberty by embracing a statutory freedom at the expense of abandoning a constitutional one. To the ends of advancing these views and of elaborating on them, the State of Alabama respectfully submits this brief for the Court's consideration.

SUMMARY OF ARGUMENT

In enacting the civil-remedy provision of the Violence Against Women Act, 42 U.S.C. § 13981, Congress assumed unique power. It asserted a power over "commerce" that leaves no meaningful limit on national regulation of all manner of local regulatory matters, except an increasingly dormant proclivity for self-restraint. And it asserted an enforcement authority that simply does not do the normal things that section 5 laws do. Even the most well-meaning policy objectives

should not be allowed to circumvent these foundational restrictions on the creation of a Federal police power.

1. As a matter of constitutional word choice and precedent, to say nothing of sheer common sense, tort remedies for gender violence no more involve the regulation of interstate "commerce" than do any other provision of State criminal, tort or family law. The section has far fewer commercial qualities than the guns-around-schools legislation invalidated in *United States v. Lopez*, 514 U.S. 549 (1995). And unlike the legislation upheld in *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964), and *Katzenbach v. McClung*, 379 U.S. 294 (1964), it has no parallel to the assuredly commercial act of not allowing a group of individuals to purchase goods or services. The civil-remedy provision simply does not "substantially affect" interest commerce, at least if this limit on congressional authority is to retain any meaningful content and if this Court is to retain any meaningful role in finally interpreting the commerce clause.

2. Likewise, only a decision to ignore the text of the Fourteenth Amendment and to break with more than 100 years of precedent would allow the Court to sustain the provision under Congress's section 5 enforcement authority. Whether one considers nineteenth-century precedents, *United States v. Harris*, 106 U.S. 629 (1883), the *Civil Rights Cases*, 109 U.S. 3 (1883), or twentieth-century ones, *City of Boerne v. Flores*, 521 U.S. 507 (1997), *Florida Prepaid Postsecondary Education Expense Bd. v. College Savings Bank*, 119 S. Ct. 2199 (1999), all show that Congress's "remedial" power under section 5 may not be invoked when there are no constitutional violations to correct. Because the Fourteenth Amendment regulates State action, not private conduct, and because there has been no tenable showing that the States have violated the Fourteenth Amendment through their regulation of private acts of gender-based violence, section 5 does not support this farreaching measure. As the federal government itself

acknowledges (U.S. Br. 58-59 n.29), the provision "does not operate against the States at all," confirming that a decision upholding this law would break not only with section five precedent but also with this Court's long-understood State-action doctrine.

ARGUMENT

Section 13981 of Title 42 of the United States Code creates a federal civil cause of action against any "person . . . who commits a crime of violence motivated by gender . . . for the recovery of compensatory and punitive damages, injunctive and declaratory relief." The law defines "crime of violence" to cover any "felony" under "State or Federal" law against another person, and defines "motivation by gender" to mean a violent crime "committed because of gender . . . and due, at least in part, to an animus based on the victim's gender." 42 U.S.C. §§ 13981(c), (d)(1) & (2). Unlike other provisions of the VAWA, *see* 18 U.S.C. §§ 2261-62, the section does not contain a jurisdictional provision requiring the "crime of violence" to be interstate in nature. In enacting the law, Congress drew on two purported sources of authority — the commerce clause and section 5 of the Fourteenth Amendment. 42 U.S.C. § 13981(a). Neither one suffices, however, to support this unprecedented and in the end unbounded assumption of federal power.

I. THE CIVIL-REMEDY PROVISION OF THE VAWA CANNOT BE SUSTAINED AS A LAW DESIGNED "TO REGULATE COMMERCE . . . AMONG THE SEVERAL STATES."

A. The Words Of The Commerce Clause Do Not Support National Tort Legislation For Intrastate Crimes.

"The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

U.S. Const., art. I, § 8, cl. 3.

By its terms, the "Power . . .To regulate Commerce . . . among the several States" does not remotely establish authority to create a national damages action for intrastate felonies involving gender violence. At the time the Constitution was written and ratified, the term "commerce" merely involved "trade or traffic," Nathaniel Bailey, *An Universal Etymological English Dictionary* (26th ed. 1789), and concerned an "[e]xchange of one thing for another," Thomas Sheridan, *A Complete Dictionary of the English Language* (6th ed. 1796). Modern dictionaries confirm that nothing has changed. They, too, read the term in this way. *See Random House Webster's Unabridged Dictionary* (2d ed. 1997) ("an interchange of goods or commodities, esp. on a large scale between different countries (foreign commerce) or between different parts of the same country (domestic commerce)").

By any recognizable standard of meaning, it is difficult to ascribe a state of mind to the drafters of the clause that would make sense out of extending a national power to regulate "an interchange of goods or commodities" "among the several States" to tort remedies for intrastate crimes based on gender animus. Still less is it possible to do so for the people who ratified the clause and had only the words of the provision to go by.

Context compels a like conclusion. Besides interstate commerce, the commerce clause also empowers Congress to "regulate Commerce with foreign Nations . . . and with the Indian Tribes." Yet, in doing so, the noun "commerce" surely has the same meaning when used in the same clause of the same section of the same article. A reading of the term, however, that permits regulation of activities beyond the "interchange of goods or commodities" makes even less sense with regard to international and Indian affairs than it does with regard to interstate activities. No amount of word play permits the conclusion that the clause creates a general police (or tort)

power over conduct occurring within foreign nations and tribal lands.

Elsewhere in Article I, the Constitution uses the word "commerce" in establishing that "no Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another." U.S. Const., art. I, § 9, cl. 6. Again, the term plainly refers to an "interchange of goods or commodities" — in this instance, as discriminatorily regulated by one State port relative to another. *Cf.* U.S. Const., art. I, § 8, cl. 10 (empowering Congress "To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations"). Add to these contextual clues the decision of the Framers to specify the existence of certain National legislative powers at all, necessarily implying the absence of other powers, *see* art. I, § 1 (referring just to the powers "herein granted"), and it becomes clear that the clause cannot sustain this farreaching law. An intertextual analysis in the end offers no support, or even a linguistic hint, that the ratifiers of the commerce clause meant to permit its invocation in the setting of tort remedies for intrastate felonies involving gender violence.

B. Precedent Forecloses The Exercise of An Unlimited Commerce Power.

The Court's commerce clause precedents also defeat this novel exercise of congressional authority. Proving that it is easier to write a Constitution than to interpret it, the Court's cases to be sure have taken several Hegelian turns in ascertaining the amount of intrastate commercial activity that will suffice to permit congressional lawmaking in this area. But one interpretive turn that the Court has never taken is to construe the power to regulate commerce to include a general police power over local crimes, torts, family law and other social matters. Because this single section of the VAWA attempts to traverse that line, no amount of deference to congressional expertise can sustain this Rubicon-crossing law.

Time and again, the Court has reminded Congress that its commerce powers are not unlimited. As a matter of "first principles," the "Constitution creates a Federal Government of enumerated powers," all of which — the commerce clause included — are "subject to outer limits." *Lopez*, 514 U.S. at 557. An unwavering line of precedents confirms the Court's steadfast adherence to this foundational tenet:

* "It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. . . . Comprehensive as the word among is, it may very properly be restricted to that commerce which concerns more States than one. . . . The enumeration presupposes something not enumerated; and that something, if we regard the language, or the subject of the sentence, must be the exclusively internal commerce of a State." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194-95 (1824).

* The clause does not "obliterate the distinction between what is national and what is local and create a completely centralized government." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937).

* "The question is necessarily one of degree," and the clause applies to those intrastate activities that "have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions." *Jones & Laughlin*, 301 U.S. at 36-38.

* "The activities that are beyond the reach of Congress are 'those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government.'" *Katzenbach v.*

McClung, 379 U.S. 294, 302 (1964) (quoting *Gibbons*, 22 U.S. (9 Wheat) at 195).

* "[T]he power to regulate commerce, though broad indeed, has limits" which "the Court has ample power" to enforce. *Maryland v. Wirtz*, 392 U.S. 183, 196 (1968), *over'd on other grounds*, *National League of Cities v. Usery*, 426 U.S. 833 (1976), *over'd*, *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

* The Constitution remains "an instrument of limited and enumerated powers," and "[n]o one disputes the proposition that the Constitution created a Federal Government of limited powers." *New York v. United States*, 505 U.S. 144, 155-56 (1992) (quotation omitted).

* "To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Lopez*, 514 U.S. at 567.

* "[T]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." *Lopez*, 514 U.S. at 552 (quoting *The Federalist* No. 45 (J. Madison)).

With this constant in mind, the Court has construed the commerce clause to permit Congress to regulate just three areas of commercial activity: (1) the use of the channels of interstate commerce; (2) the instrumentalities of, or persons or things in, interstate commerce; and (3) other activities that "substantially affect" interstate commerce. *Lopez*, 514 U.S. at 557-59. It is common ground that section 13981 is not covered by the first two commerce clause safe harbors.

As to the last inquiry, which was also the only one at stake in *Lopez*, two bookend questions predominate — (1) whether

a legitimate rationale exists for concluding that the activity "substantially affects" interstate commerce as the Court has defined those terms, *see Lopez*, 514 U.S. at 557 n.2, 562, and (2) whether that rationale "would convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States," *id.* at 567. *See id.* at 564 ("Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate."); *id.* (asking whether "acceptance of the Government's rationales would . . . authorize a general federal police power"). *Cf. R.A.V. v. City of St. Paul*, 505 U.S. 377, 396 (1992) (law cannot be justified by a governmental "interest" "[t]hat is precisely what the First Amendment forbids"); *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (asserted "governmental interest [must be] unrelated to the suppression of free expression"). Short of a "substantial effects" rationale that meaningfully confines congressional power under the commerce clause, in other words, the law exceeds Congress's authority.

In applying the "substantial effects" test in *Lopez*, the Court concluded that the law failed both requirements. One, there was no plausible explanation why the Gun-Free School Zones Act substantially affected interstate commerce. The law was a "criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." 514 U.S. at 561. It was not "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Id.* And it "contain[ed] no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce." *Id.*

Two, every rationale offered to sustain the law violated the overriding principle linking the Court's commerce clause cases — that, whatever the explanation for the exercise of

power, it cannot convert a commerce power of limited reach into one of unbounded breadth. *Id.* at 563-68. The government, for example, argued that firearms possession in a school zone could result in violent crime, which in turn could create substantial insurance costs throughout the country or create disincentives to travel to parts of the country that appeared to be unsafe. *Id.* at 563-64. It also argued that firearms possession in a school zone could threaten the learning environment, which in turn could result in a less productive citizenry. *Id.* at 564.

The problem with both rationales, the Court concluded, was that it "was hard pressed to posit any activity by an individual that Congress is without power to regulate" under these explanations. *Id.* Under the "cost of crime" approach, "Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce." *Id.* And under the "national productivity" theory, any activity that Congress "found was related to the economic productivity of individual citizens" would be fair game, including such "family law" issues as "marriage, divorce, and child custody." *Id.*

C. This Provision Does Not Meet The "Substantial Effects" Test, And Has Even Less Connection To Interstate Activity Than The Guns-Free School Zone Act Invalidated In *Lopez*.

Measured against this standard, section 13981 of the VAWA clearly fails. First, as in *Lopez*, the law on its face provides a tort remedy for a criminal violation that "by its terms has nothing to do with 'commerce' or any sort of economic enterprise." 514 U.S. at 561. The covered acts are inherently local in nature, and involve precisely the kinds of criminal, tort and family law policy choices that State governments have historically been responsible for making. Nothing about the law or its terms suggests any economic or commercial activity. Nor, in contrast to *Wickard v. Filburn*,

317 U.S. 111 (1942), is the provision "part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Lopez*, 514 U.S. at 561. Quite the opposite is true. The civil-remedy provision of VAWA stands conspicuously apart from the rest of this extensive legislative package, which either involves regulations with explicit interstate components or contains direct authorization for federal funding. The law also lacks any "jurisdictional element" which "might limit its reach to a discrete set of" gender-related crimes "that additionally have an explicit connection with or effect on interstate commerce." *Id.* at 561-62.

Second, the rationales offered by the federal government for meeting the "substantial effects" test fail to circumvent the same pitfall that doomed the law at issue in *Lopez*. They, too, have no stopping point, and accordingly provide no assurance that the law is not an impermissible seizure of national power dressed in interstate commerce clothing.

The supposed commercial bases of the law (U.S. Br. 20) are that violence based on gender animus (1) "deters people from seeking jobs, including jobs in interstate businesses, that would require them to work at certain hours or in certain places," (2) inhibits people from "travelling . . . and from engaging in other interstate activity," (3) impedes "victims' ability to work at all," creating homelessness, poverty, and dependence, and (4) imposes "increased medical and other costs on victims, their employers and insurers, and state and local governments." These rationales are of a piece with those expressed in *Lopez*. Every one of them would apply with equal force to every felony in existence, whether motivated by gender-based animus or not, and no matter "how tenuously they relat[ed] to interstate commerce." *Lopez*, 514 U.S. at 564. All violent crime, as any victim will attest, runs the risk of deterring its victims from seeking jobs, travelling, working at all, and imposing an assortment of other economic and non-economic

costs. To accept these attenuated connections to interstate commerce would require the Court to do what it refused to do in *Lopez* or in any other commerce clause case — abandon the view that "the Constitution's enumeration of powers . . . presuppose[s] something not enumerated" and in the process abandon the "distinction between what is truly national and what is truly local." *Id.* at 567-68.

As in *Lopez*, the law also seizes authority over areas that the States have as a matter of tradition and custom governed for themselves. To begin with, the "States possess primary authority for defining and enforcing criminal law." *Lopez*, 514 U.S. at 561 n.3 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993)) (internal quotation omitted). And when "Congress criminalizes conduct already denounced as criminal by the States, it effects a change in the sensitive relation between federal and state criminal jurisdiction." *Id.* (quoting *United States v. Emmons*, 410 U.S. 396, 411-12 (1973)) (internal quotation omitted). That "sensitive relation" is "change[d]" regardless of whether Congress redefines criminal conduct, as in *Lopez*, or supplies new enforcement remedies for that conduct, as in this instance.

Not only does section 13981 concern criminal conduct that the States uniformly punish, but it also creates a civil remedy where one already exists. As the Appendix to this brief confirms, all States permit tort and other remedies for such violent acts, making the VAWA provision as superfluous as it is invasive. *See Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984) (noting "States' traditional authority to provide tort remedies to its citizens"). To the extent some States still retain inter-spousal tort immunities for these actions — today, just two, *see* Appendix — VAWA's attempt to override those immunities merely confirms its displacement of core local regulation of family law issues that it has never been the province of Congress to supersede. *See Rose v. Rose*, 481 U.S. 619, 625 (1987) ("[w]e have consistently recognized that

. . . domestic relations . . . belong[] to the laws of the States and not to the laws of the United States") (citation and quotation omitted). All things considered, the provision's needless overlap with some State criminal, tort and family law requirements, together with its overriding of several others, makes it as unnecessary as it is improper.

Nor do *McClung* and *Heart of Atlanta Hotel* change things. In neither case, contrary to petitioners' arguments, did the Court sustain the legislation merely because it amounted to civil rights legislation. Rather, the Court upheld the provisions only after explaining their close links to interstate commerce. *See Heart of Atlanta Motel*, 379 U.S. at 250 (the law "is carefully limited to enterprises having a direct and substantial relation to the interstate flow of goods and people"); *McClung*, 379 U.S. at 304 ("Congress prohibited discrimination only in those establishments having a close tie to interstate commerce"). And, most assuredly, application of the federal laws to both cases had the requisite nexus to interstate commerce. The decision not to sell goods and services to an entire class of individuals is in its very nature a commercial act, and a decidedly immoral one as well.

As a matter of precedent, then, while the VAWA provision suffers from the same types of defects that compelled invalidation of the Gun-Free School Zones Act in *Lopez*, it differs on its face from every other federal law the Court has upheld in this area, including the most farreaching regulations of intrastate activities. This tort remedy does not approach such prototypical economic activities as intrastate coal mining, *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981), intrastate extortionate credit transactions, *Perez v. United States*, 402 U.S. 146 (1971), inns and hotels catering to interstate guests, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), restaurants using substantial interstate supplies, *Katzenbach v. McClung*, 379 U.S. 294 (1964), or the production and consumption of home-

grown wheat, *Wickard v. Fillburn*, 317 U.S. 111 (1942). The commercial nature of these activities simply has no parallel to the intrastate tort created by VAWA. The societal problems that create gender violence have no more to do with interstate commerce than do the problems of high school drop-out rates, high divorce rates or dysfunctional families.

That leaves the problem that Congress felt differently about the matter. Yes, Congress conducted extensive findings regarding the alleged impact of gender-animus-based crimes on interstate commerce. And, yes, those findings are entitled to deference. But, in this respect, the case is merely a variation on a theme of *City of Boerne v. Flores*. As that case teaches, neither the competence of the National legislature nor any State legislature to make empirical findings about a social, civil rights or commercial issue permits one or the other to invade "the province of the Judicial Branch . . . 'to say what the law is.'" 521 U.S. at 536 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). And no amount of factfinding can alter that conclusion. Thus, in reviewing section 5 legislation, the Court decides what amounts to a violation, while Congress receives substantial deference over the remedy, and the Court decides whether the predicate for prophylactic legislation exists while Congress receives substantial deference over the extent of the remedy. So, too, under the Commerce Clause. The Court decides the meaning of "substantial effects" on interstate commerce while Congress receives broad deference regarding the appropriate legislation to enact within that sphere.

To permit legislative factfindings, by any branch of government, to obtain more deference that this has no fathomable limit. It would make any legislator, or for that matter any aide with a laptop, potentially the final dispositor of what the Constitution means — a double insult to the Constitution's allocation of a final interpretive power to this Court and of a plenary police power to the States. This limitation is no less important under the commerce clause than

it is under section 5 of the Fourteenth Amendment, particularly given the potential of factfindings regarding "effects" on interstate commerce to outpace any meaningful limit on federal power. Respect for the constitutional judgment of a coordinate branch of government is one thing; blind deference is another.

It thus made no difference in *City of Boerne* that the Congress had spent as much time as it did here, if not more, compiling an empirical record regarding the impact of generally applicable laws on the free exercise of religion. It still fell to the Court to decide whether the Religious Freedom Restoration Act was permissible section 5 legislation, and more concretely whether it responded to a pattern and practice of constitutional violations and did so in a proportional and congruent way.

The same need for judicial review of the political branches of government applies here. The VAWA congressional findings all proceed at such an imposing level of generality that it is difficult to imagine what intrastate crime, tort, or family law issue would not be covered by them. To borrow a page from tort law, there is a considerable difference between causation in fact and proximate cause. Most of the congressional findings, granted, make a plausible case for the position that intrastate acts of violence, whether motivated by gender or not, will like a rock thrown into a pond have effects that lead to other effects that potentially affect interstate commerce. *Cf. Palsgraf v. Long Island R. Co.*, 162 N.E. 99, 103 (N.Y. 1928). But those findings simply do not establish a proximate relationship between the underlying crime and a substantial effect on interstate commerce. To hold otherwise would abandon the Court's "independent evaluation of constitutionality under the Commerce Clause." *Lopez*, 514 U.S. at 562. Congress's findings in the last analysis entitle it to respect, not hegemony. Because the congressional findings here operate at such a high level of generality that they would empower Congress to regulate "any activity by an individual,"

id. at 564, they simply do not suffice. Section 13981 is not permissible commerce clause legislation.

II. A NATIONAL TORT REMEDY FOR PRIVATE ACTS OF GENDER-MOTIVATED VIOLENCE DOES NOT CONSTITUTE PERMISSIBLE ENFORCEMENT LEGISLATION UNDER SECTION 5.

Congress also invoked section 5 of the Fourteenth Amendment in enacting this provision. In the legislature's view, bias and discrimination against women in the States' criminal justice systems "often depriv[e] victims of crimes of violence motivated by gender of equal protection of the laws and the redress to which they are entitled," making the provision "necessary to guarantee equal protection of the laws." H.R. Conf. Rep. No. 103-711, at 385, *reprinted in* 1994 U.S.C.C.A.N. 1839, 1853. Yet even the most modest scrutiny of this law confirms that it remedies complex social and criminal justice concerns, not constitutional violations. Accordingly, it cannot be justified (1) under Congress's unconditional authority to proscribe and remedy what the Fourteenth Amendment already proscribes or (2) under Congress's conditional authority to "prohibit[] conduct which is not itself unconstitutional." *City of Boerne*, 521 U.S. at 518 (citation omitted).

A. Section 5 Is A Remedial Power.

> Section 1 . . . No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.
>
> * * *
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. Const. amend. XIV, §§ 1, 5.

In word and design, the section 5 enforcement power is a "remedial" one. *City of Boerne*, 521 U.S. at 519. Judicial review of such legislation thus begins by "identify[ing] the Fourteenth Amendment 'evil' or 'wrong' that Congress intended to remedy." *Florida Prepaid*, 119 S. Ct. at 2207. The Court then asks whether the legislation merely bans violations of the Fourteenth Amendment as the Court has defined them, or exceeds those requirements in order prophylactically to "remedy" past violations or "prevent" future ones.

All congressional remedies must reflect a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne*, 521 at 519-20. And an effort prophylactically to ban what the Constitution does not requires a predicate "pattern or practice of unconstitutional conduct." *Id.* at 534; *Florida Prepaid*, 119 S. Ct. at 2207. At all events, no section 5 right exists in the absence of a cognizable section 1 wrong.

B. Section 13981 Lacks The Requisite Hallmarks Of Either Traditional Or Prophylactic Section 5 Legislation.

1. The Provision Cannot Be Sustained As Traditional Enforcement Legislation.

By any measure, it cannot tenably be argued that section 13981 targets conduct that itself violates the Fourteenth Amendment. The provision creates a tort cause of action against private parties who commit gender-motivated crimes and does so with no regard to whether the State participated in the activity or otherwise violated the individual's Fourteenth Amendment rights. On this basis alone, the law cannot be justified on the ground that it merely asks the States to do what the Equal Protection Clause already requires.

It is beyond debate that private conduct, even criminal conduct, does not implicate the Fourteenth Amendment, which

by its terms ("No State shall . . .") imposes restrictions on the States, not on private individuals. "This has been the view of the Court from the beginning," and it "remains the Court's view today." *United States v. Guest*, 383 U.S. 745, 755 (1966). "Because the Amendment is directed at the States, it can be violated only by conduct that may be fairly characterized as 'state action.'" *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 924 (1982). No such characterization can be made of violent crimes committed by one private individual against another, particularly when the section 5 tort remedy exists regardless of the State's efforts to prosecute the crime and regardless of the State's efforts legislatively to provide the victim with a civil remedy. *See* Appendix.

2. The Provision Also Is Not Permissible Prophylactic Legislation.

Nor does section 13981 constitute a legitimate exercise of Congress's "prophylactic" power to "prohibit[] conduct which is not itself unconstitutional." *City of Boerne*, 521 U.S. at 518 (citation omitted). Unlike "proper prophylactic § 5 legislation," this civil remedy does not anticipate or "respond to a history of 'widespread and persisting deprivation of constitutional rights.'" *Florida Prepaid*, 119 S. Ct. at 2210 (quoting *City of Boerne*, 521 U.S. at 526). Whether one considers past equal protection violations or potential future ones, the Federal and State case reporters are conspicuously silent about actual or even alleged State violations of equal protection stemming from the administration, enforcement and prosecution of gender-related crimes.

Except for a smattering of highly-generalized and conclusory statements in the congressional record about the inadequacies of State criminal justice systems in this area, the record is utterly devoid of support for the notion that the States have brought these extra-constitutional requirements on themselves by violating the constitutional rights of their citizens. Even the States that have supported the law have not claimed that it is

necessary to remedy constitutional violations that they or anyone else has committed. *See* Brief *Amici Curiae* of Arizona, *et al.*

Nor on its face does the provision even pretend to be section 5 legislation. The VAWA remedy, unlike every other section 5 remedy ever upheld, runs not against the alleged constitutional wrongdoer — the State — but against the criminal. That of course may make good policy sense, but hardly accords with the section 5 directive to remediate *State* violations of the Fourteenth Amendment.

Against the backdrop of the State-action doctrine, it takes great ingenuity just to conceive of fact patterns that would legally establish State violations of equal protection. But, importantly, neither this Court nor any other (to our knowledge) has ever reduced such theoretical speculations to concrete decisions by the State or Federal courts. Whatever quantum of deference Congress receives in exercising this remedial power, prophylactic section 5 laws cannot be sustained on the basis of violations that do not exist. On this record, Congress simply lacked the predicate pattern of actual or empirically-threatened constitutional violations necessary to impose these extra-constitutional obligations.

C. Precedent Forecloses Congress's Reliance On Section 5 To Sustain This Tort Remedy.

Precedent from this century and the last also undermines this assertion of section 5 authority. *City of Boerne* and *Florida Prepaid* both invalidated legislation that did not respond to a record of constitutional violations and that was disproportionate to any alleged harm. Yet even these laws involved the existence of *some* isolated examples of unconstitutional State action, placing the VAWA civil remedy even further outside the realm of constitutionality than the laws invalidated in these cases.

Not long after ratification of the Fourteenth Amendment, the Court also issued two other decisions that speak to this one — *United States v. Harris*, 106 U.S. 629 (1883), and the *Civil Rights Cases*, 109 U.S. 3 (1883). In both, the Court invalidated purported section 5 legislation that, like section 13981 of the VAWA, reached only private action. *Harris* invalidated section two of the Civil Rights Act of 1871, which said that a person could not "conspire" to "depriv[e] . . . any person . . . of the equal protection of the laws." 106 U.S. at 632. Applying traditional State-action doctrine, the Court said that the Fourteenth Amendment

> is a guaranty of protection against the acts of the State government itself. It is . . . not a guaranty against the commission of individual offenses; and the power of Congress . . . to legislate for the enforcement of such a guaranty, does not extend to the passage of laws for the suppression of crime within the States.

Id. at 638 (quotation omitted). Because section 5 "does not add anything to the rights of one citizen against another" and because "[t]he only obligation resting upon the United States is to see that the States do not deny the right . . . and no more," *id.*, the Court refused to sustain the law under section 5.

The *Civil Rights Cases*, for like reasons, invalidated the public-accommodations provisions of the Civil Rights Act of 1875, which created a private right of equal access to "inns, public conveyances . . . and other places of public amusement," along with private causes of action for damages against those who violated the requirement. 109 U.S. at 9. Section 5, the Court held, "does not invest Congress with power to legislate upon subjects which are within the domain of State legislation; but to provide modes of relief against State legislation, or State action." *Id.* at 11-12. Otherwise, Congress could promulgate a "code of municipal law regulative of all private rights between man and man in society," which would allow Congress to "take the place of the State legislatures and . . .

supersede them," *id.* at 13, in a way that was "repugnant to the Tenth Amendment of the Constitution." *Id.* at 15. While laws similar to the ones invalidated in *Harris* and the *Civil Rights Cases* have since been upheld under other constitutional provisions, *City of Boerne* makes clear that the section 5 analyses in both cases remain valid. *See City of Boerne*, 521 U.S. at 524-25, 532-33. *See also Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 384-85 (1979) (Stevens, J., concurring) ("Thus, while § 1985(3) does not require that a defendant act under color of state law, there still can be no claim for relief based on a violation of the Fourteenth Amendment if there has been no involvement by the State. The requirement of state action, in this context, is no more than a requirement that there be a constitutional violation."); *id.* at 378-79, 381 (Powell, J., concurring) (the Constitution does not "create any right to be free of gender-based discrimination perpetuated solely through private action"). Both the text of the Fourteenth Amendment and precedent defeat this exercise of section 5 authority.

III. THE INVALIDATION OF ONE PROVISION OF THE MULTI-SECTION VAWA PRESERVES OUR DUAL SOVEREIGNTY, AND CONFIRMS THAT FEDERALISM IS ONE AMONG MANY COUNTER-MAJORITARIAN GUARANTEES THAT PRESERVE LIBERTY.

In the face of considerable congressional testimony regarding the alleged inadequacies of State criminal justice systems in this area, it asks too much to refrain from pointing out that the States' hands are not entirely free in remediating and deterring gender-motivated violence. Indeed, much of the Court's work over the last 50 years has been prompted by States that conducted criminal investigations too vigorously or were otherwise too zealous in the enforcement of their criminal laws.

Case after case imposes counter-majoritarian limitations on the States when it comes to local efforts to ferret out and punish crime, or even to curb the underlying social problems that prompt gender violence. Under the Fifth Amendment, voluntary admissions of guilt may be suppressed in the absence of warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966), a case that arose from an overly-vigorous investigation of an alleged rapist. Under the Eighth Amendment, States may not impose capital punishment solely for rape. *See Coker v. Georgia*, 433 U.S. 584 (1977). Under the Fifth Amendment, the States may not impose a criminal sanction, then add a punitive civil sanction for gender-related or any other crimes. *See United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 365 (1984). *See Whalen v. United States*, 445 U.S. 684 (1980) (imposition of consecutive sentences for rape and murder violated double jeopardy clause). Under the Fourth Amendment, evidence of wrongdoing may be suppressed and the criminal allowed to go free whenever the incriminating evidence represents the fruit of an "unreasonable search and seizure." *Mapp v. Ohio*, 367 U.S. 643 (1961). *See also, e.g., Hayes v. Florida*, 470 U.S. 811 (1985) (reversing sexual battery conviction in light of Fourth Amendment violation). Under the Sixth Amendment, the accused has an assortment of jury trial rights, including ultimately the right of jury nullification, as well as rights under the Confrontation Clause, which impose substantial hurdles when it comes to the prosecution of gender-related crimes. *See Brady v. Maryland*, 373 U.S. 83 (1963). *See also Holloway v. United States*, 435 U.S. 475 (1978) (reversing rape conviction due to assistance of counsel violation). Federal habeas law also independently imposes other limitations on the States' efforts in these areas. *See, e.g., Kimmelman v. Morrison*, 477 U.S. 365 (1986) (granting habeas relief to convicted rapist). And perhaps most importantly in the area of gender-related violence, the First Amendment places imposing restrictions on State efforts to strike at the underlying causes of such conduct — making it

difficult for States to restrict the release of movies or television shows with excessive violence and sex, to regulate access to indecent activities on the internet, to curb sales of exploitative magazines, or to bar some types of nude or even semi-nude dancing. *See Reno v. ACLU*, 521 U.S. 844 (1997); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990); *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981); *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676 (1968); *Kingsley Internat'l Pictures Corp. v. Regents of the Univ. of N.Y.*, 360 U.S. 684 (1959). Even the most well-meaning and capable of State lawmakers thus face a daunting task in trying to solve this urgent social problem while navigating these doctrinal shoals.

The point of all this is not to question these rulings, but to embrace them. They confirm the essential point of this brief, namely, that even the most virtuous public policy objectives — making society safe for law-abiding citizens or rooting out gender-motivated violence — have appropriate limitations. The history of judicial review is the history of safeguarding structural and individual-rights guarantees of liberty against the exigencies of the moment. Just as the Court has not hesitated to vindicate individual-liberty rights against society's need for collective security and has not hesitated to ensure an appropriate separation of powers among the National branches of government, it should not hesitate here to vindicate the modest, but foundational, principle that Congress has limited and enumerated powers. The libertarian objective of the Framers after all was to "split the atom of sovereignty," *Saenz v. Roe*, 119 S. Ct. 1518, 1527 n.17 (1999) (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)), not to multiply it.

Far from protecting State sovereignty for it own sake, then, the transcendent goal of federalism is to advance the unique brand of American freedom that only divided and dispersed government can provide. "[A] healthy balance of power between the States and the Federal Government will reduce the

risk of tyranny and abuse from either front. . . . In the tension between federal and state power lies the promise of liberty." *Gregory v. Ashcroft*, 501 U.S. 452, 458-59(199). While it is assuredly difficult to uphold this federalist abstraction in the face of concrete laws designed to protect religious liberties, to remove guns from schools or to remedy gender violence, it is doubtful whether any other branch of government is equipped to do so.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

STATE CIVIL ACTIONS AND CRIMINAL PROVISIONS		
	Alabama	**Alaska**
Anti-Stalking Laws	YES Ala. Code § 13A-60-90	YES Alaska Stat. §§ 11.41.260 & 41.270
Warrantless Arrest for Domestic Violence	YES § 15-10-3	YES § 12.25.030(b)
Protective Orders	YES § 30-5-1, *et seq.*	YES § 18.66.100
Civil Tort: Assault/Battery	YES* 489 So.2d 1097	YES 985 P.2d 460
Civil Tort: Intentional Infliction of Emotional Distress	YES 394 So.2d 361	YES 705 P.2d 454

* *E.g.*, *Murray v. Murray*, 598 So.2d 921 (Ala. Ct. App. 1992) (wife recovered $55,000 from husband who physically abused her).

	Arizona	Arkansas
Anti-Stalking Laws	YES Ariz. Rev. Stat. § 13-2923	YES Ark. Code Ann. § 5-71-229
Warrantless Arrest for Domestic Violence	YES § 13-3601 (B)	YES § 16-81-113
Protective Orders	YES § 13-3602	YES § 9-15-201, *et seq.*
Civil Tort: Assault/Battery	YES 923 P.2d 875	YES* 914 S.W.2d 285
Civil Tort: Intentional Infliction of Emotional Distress	YES 578 P.2d 152	YES 596 S.W.2d 681

* *E.g., Cater v. Cater*, 846 S.W.2d 173 (Ark. 1993) (wife recovered $370,000 for assault and battery by husband).

	California	Colorado
Anti-Stalking Laws	YES Cal. Penal Code § 646.9	YES Colo. Rev. Stat. § 18-9-111 4(a)(I)(II)
Warrantless Arrest for Domestic Violence	YES Cal. Penal Code §§ 273.5 & i3701	YES § 18-6-803.6
Protective Orders	YES Fam. Code § 6240, *et seq.*, § 6320, *et seq.*; Penal § 273.6	YES 14-4-101, *et seq.*
Civil Tort: Assault/Battery	YES 31 Cal. Rptr.2d 259	YES 919 P.2d 910
Civil Tort: Intentional Infliction of Emotional Distress	YES 240 P.2d 282	YES 645 P.2d 292

	Connecticut	Delaware
Anti-Stalking Laws	YES Conn. Gen. Stat. § 53a-181(c)(d)(e)	YES Del. Code tit. 11, § 1312A
Warrantless Arrest for Domestic Violence	YES § 46b-38b	YES tit. 11, § 1904
Protective Orders	YES § 46b-15	YES tit. 10, § 1041, *et seq.*
Civil Tort: Assault/Battery	YES 362 A.2d 798	YES 668 A.2d 1355
Civil Tort: Intentional Infliction of Emotional Distress	YES 510 A.2d 1337	YES 574 A.2d 843

	D.C.	Florida
Anti-Stalking Laws	YES D.C. Code § 22-504	YES Fla. Stat. Ann. § 784.048
Warrantless Arrest for Domestic Violence	YES § 16-1031(a)	YES § 901.15(6)
Protective Orders	YES § 16-1001	YES § 741.30 & .31
Civil Tort: Assault/Battery	YES 412 A.2d 948	YES 660 So.2d 350
Civil Tort: Intentional Infliction of Emotional Distress	YES 580 A.2d 660	YES 373 So.2d 956

	Georgia	Hawaii
Anti-Stalking Laws	YES Ga. Code § 16-5-90, *et seq.*	YES Haw. Rev. Stat. § 711.1106, *et seq.*
Warrantless Arrest for Domestic Violence	YES § 17-4-20(a)	YES §§ 709-906(4), 803-5
Protective Orders	YES § 19-13-3	YES § 586-4
Civil Tort: Assault/Battery	YES* 428 S.E.2d 431	YES 375 P.2d 229
Civil Tort: Intentional Infliction of Emotional Distress	YES** 409 S.E.2d 835	YES 643 P.2d 532

* Except for claims barred by interspousal tort immunity. *See* Ga. Code Ann. § 53-501.

***Compare id. with Catlett v. Catlett*, 388 S.E.2d 14 (Ga. Ct. App. 1989) (ex-wife recovered $20,000 for assault, battery and false imprisonment).

	Idaho	Illinois
Anti-Stalking Laws	YES Idaho Code § 18-7905	YES Ch. 720 Ill. Comp. Stat. 5/12-7.3
Warrantless Arrest for Domestic Violence	YES § 19-603(6)	YES Ch. 40 ¶ 2303-1
Protective Orders	YES § 39-6301, *et seq.*	YES Ch. 750 § 60/201 *et seq.*
Civil Tort: Assault/Battery	YES 718 P.2d 1167	YES 648 N.E.2d 329
Civil Tort: Intentional Infliction of Emotional Distress	YES* 606 P.2d 944	YES 174 N.E.2d 157

* *E.g., Curtis v. Firth*, 850 P.2d 749 (Idaho 1993) (affirming $1 million award for emotional distress and battery).

	Indiana	Iowa
Anti-Stalking Laws	YES Ind. Code § 35-45-10, *et seq.*	YES Iowa Code § 708.11
Warrantless Arrest for Domestic Violence	YES § 35-33-1-1	YES § 236.12(2)
Protective Orders	YES § 34-26-2-1, *et seq.*	YES § 236.1, *et seq.*
Civil Tort: Assault/Battery	YES* 570 N.E.2d 27	YES 567 N.W.2d 414
Civil Tort: Intentional Infliction of Emotional Distress	YES 570 N.E.2d 27	YES 203 N.W.2d 252

* *E.g.*, *Landis v. Landis*, 664 N.E.2d 754 (Ind. App. 1996) (affirming $538,000 award for emotional distress, assault and battery).

	Kansas	Kentucky
Anti-Stalking Laws	YES Kan. Stat. Ann. § 21-3438	YES Ky. Rev. Stat. § 508.130-150
Warrantless Arrest for Domestic Violence	YES § 22-2401	YES § 431.005(2)
Protective Orders	YES § 60-3101, *et seq.*	YES §§ 403.715-403.785, 209.01-209.16
Civil Tort: Assault/Battery	YES 645 P.2d 916	YES 945 S.W.2d 948
Civil Tort: Intentional Infliction of Emotional Distress	YES 645 P.2d 916	YES 671 S.W.2d 247

	Louisiana	Maine
Anti-Stalking Laws	YES La. Rev. Stat. Ann § 14:40.2	YES Me. Rev. Stat. tit. 17A, § 506-A
Warrantless Arrest for Domestic Violence	YES § 46:2140, art. 1573	YES tit. 19, § 770(5) tit. 7 § 15(a)(A)(5-a)
Protective Orders	YES § 46:2131-2142	YES tit. 15 § 321, 19A § 4001 *et seq.*
Civil Tort: Assault/Battery	YES* 512 So.2d 389	YES 704 A.2d 383
Civil Tort: Intentional Infliction of Emotional Distress	YES 585 So.2d 1205	YES** 401 A.2d 148

* Except for claims brought during a marriage because they are barred by interspousal tort immunity. *See Duplechin v. Toce*, 497 So.2d 763 (La. Ct. App. 1986). *But see Sumrall v. Sumrall*, 612 So.2d 1010 (La. Ct. App. 1993) (estranged wife recovered $43,000 after beating).

** *E.g.*, *Henrikson v. Cameron*, 622 A.2d 1135 (Me. 1993) (affirming $115,000 damage award for intentional infliction of emotional distress).

	Maryland	Massachusetts
Anti-Stalking Laws	YES Md. Code art. 27, § 23.	YES Mass. Gen. Laws Ann. ch. 265, § 43
Warrantless Arrest for Domestic Violence	YES art. 27, § 29-404.02(3)	YES ch. 209A, § 6(7)
Protective Orders	YES Family Law § 4-501, *et seq.* 45-5-096	YES 2049A § 1, *et seq.*; 208 § 34C
Civil Tort: Assault/Battery	YES 588 A.2d 760	YES 616 N.E.2d 1091
Civil Tort: Intentional Infliction of Emotional Distress	YES* 380 A.2d 611	YES 392 N.E.2d 1053

* *E.g. Lusby v. Lusby*, 390 A.2d 77 (Md. 1978) (wife could bring tort action against husband for violent attack and attempted rape)

	Michigan	Minnesota
Anti-Stalking Laws	YES Mich. Comp. Laws §§ 750.411(h), (i); 600.2954	YES Minn. Stat. § 609.749
Warrantless Arrest for Domestic Violence	YES § 764.15.a	YES § 629.34
Protective Orders	YES §§ 600.2950, 600.2950a	YES § 518B.01
Civil Tort: Assault/Battery	YES 350 N.W.2d 772	YES 601 N.W.2d 199
Civil Tort: Intentional Infliction of Emotional Distress	YES 551 N.W.2d 206	YES 330 N.W.2d 428

	Mississippi	Missouri
Anti-Stalking Laws	YES Miss. Code § 97-3-107	YES Mo. Ann. Stat § 455.010, *et seq.*
Warrantless Arrest for Domestic Violence	YES § 99-3-7	YES § 455.085(1)
Protective Orders	YES § 93-21-1, *et seq.*	YES § 455.01, *et seq.*
Civil Tort: Assault/Battery	YES 518 So.2d 1205	YES 974 S.W.2d 513
Civil Tort: Intentional Infliction of Emotional Distress	YES 680 So.2d 803	YES 396 S.W.2d 566

	Montana	Nebraska
Anti-Stalking Laws	YES Mont. Code Ann. § 44-5-220	YES Neb. Rev. Stat. §§ 28.311.02-311.05
Warrantless Arrest for Domestic Violence	YES § 46-6-311	YES § 29-404.02(3)
Protective Orders	YES §§ 40-4-121-125; 40-15-101, *et seq.*; 45-5-626	YES § 42-90, *et seq.*
Civil Tort: Assault/Battery	YES 909 P.2d 1158	YES 551 N.W.2d 528
Civil Tort: Intentional Infliction of Emotional Distress	YES 896 P.2d 411	YES 227 N.W.2d 402

	Nevada	New Hampshire
Anti-Stalking Laws	YES Nev. Rev. Stat. § 200.575-597	YES N.H. Rev. Stat. § 633:3-a
Warrantless Arrest for Domestic Violence	YES § 171.137	YES § 173-B:9
Protective Orders	YES § 33.017, *et seq.*	YES § 173B, *et seq.*
Civil Tort: Assault/Battery	YES 930 P.2d 94	YES 132 A.2d 136
Civil Tort: Intentional Infliction of Emotional Distress	YES 625 P.2d 90	YES 593 A.2d 1158

	New Jersey	New Mexico
Anti-Stalking Laws	YES N.J. Stat. Ann. § 2C:12-10	YES N.M. Stat. Ann. § 30:3A-3
Warrantless Arrest for Domestic Violence	YES § 2C:25-21(a)	YES § 31-1-7(a)
Protective Orders	YES § 2C:25-17, *et seq.*	YES § 40-13-2, *et seq.*
Civil Tort: Assault/Battery	YES* 663 A.2d 109	YES 574 P.2d 597
Civil Tort: Intentional Infliction of Emotional Distress	YES 544 A.2d 857	YES 812 P.2d 1320

* *E.g.*, *Sielski v. Sielski*, 604 A.2d 206 (N.J. Super. 1992) (wife who suffered physical attack by husband recovered $7,000 in damages).

	New York	North Carolina
Anti-Stalking Laws	YES N.Y. Penal Law §§ 120.3 & 14; 240.26, .31	YES N.C. Gen. Stat. § 14.277.3
Warrantless Arrest for Domestic Violence	YES N.Y. Crim. Proc. § 140.025(1)	YES § 15A-401(b)
Protective Orders	YES N.Y. Fam. Ct. Act §§ 29A: 1-655 & 656; 153, *et seq.*	YES § 50B-1, *et seq.*
Civil Tort: Assault/Battery	YES 488 N.Y.S.2d 15	YES 502 S.E.2d 430
Civil Tort: Intentional Infliction of Emotional Distress	YES 373 N.E.2d 1215	YES 276 S.E.2d 325

	North Dakota	Ohio
Anti-Stalking Laws	YES N.D. Cent. Code § 12.1-17-07.1	YES Ohio Rev. Code § 2903.211
Warrantless Arrest for Domestic Violence	YES § 14-07.1-11	YES § 2935.03(B)
Protective Orders	YES § 14.07.01, *et seq.*	YES § 3113.31
Civil Tort: Assault/Battery	YES 442 N.W.2d 907	YES 524 N.E.2d 166
Civil Tort: Intentional Infliction of Emotional Distress	YES 435 N.W.2d 918	YES 453 N.E.2d 666

	Oklahoma	Oregon
Anti-Stalking Laws	YES Okla. Stat. tit. 21, § 1173	YES Or. Rev. Stat. § 163.732
Warrantless Arrest for Domestic Violence	YES Tit. 22 § 40.3(B)	YES § 133.055(2)
Protective Orders	YES Tit. 22 § 60.1, *et seq.*	YES § 107.700, *et seq.*
Civil Tort: Assault/Battery	YES 905 P.2d 223	YES 560 P.2d 275
Civil Tort: Intentional Infliction of Emotional Distress	YES 575 P.2d 1374	YES 637 P.2d 126

	Pennsylvania	Rhode Island
Anti-Stalking Laws	YES 18 Pa. Cons. Stat. § 2709	YES R.I. Gen. Laws § 11-59-2
Warrantless Arrest for Domestic Violence	YES 18 Pa. Cons. Stat. § 2711	YES § 12-29-3
Protective Orders	YES 23 § 6102, *et seq.*	YES § 15-15-1, *et seq.*
Civil Tort: Assault/Battery	YES 648 A.2d 793	YES 694 A.2d 691
Civil Tort: Intentional Infliction of Emotional Distress	YES 670 A.2d 173	YES 478 A.2d 985

	South Carolina	South Dakota
Anti-Stalking Laws	YES S.C. Code § 16-3-1700, *et seq.*	YES S.D. Codified Laws § 22-19A-1, *et seq.*
Warrantless Arrest for Domestic Violence	YES § 16-25-70	YES § 23-A-3-21
Protective Orders	YES § 20-4-10, *et seq.*	YES § 25-10-1, *et seq.*
Civil Tort: Assault/Battery	YES 259 S.E.2d 117	YES 484 N.W.2d 864
Civil Tort: Intentional Infliction of Emotional Distress	YES 276 S.E.2d 776	YES* 410 N.W.2d 159

* Unavailable against a spouse except based on post-divorce conduct. *Henry v. Henry*, 534 N.W.2d 844 (S.D. 1995). Other international tort actions against spouses remain available. *See id.*; *Scotvold v. Scotvold*, 68 S.D. 53 (1941).

	Tennessee	Texas
Anti-Stalking Laws	YES Tenn. Code § 39-17-315	YES Tex. Hum. Res. Code Ann. § 42.072
Warrantless Arrest for Domestic Violence	YES § 40-7-103(A)	YES Tex. Code Crim. Proc. art. 14.03
Protective Orders	YES § 36-3-601, *et seq.*	YES Family Code § 71.001, *et seq.*
Civil Tort: Assault/Battery	YES 963 S.W.2d 726	YES* 2 S.W.3d 346
Civil Tort: Intentional Infliction of Emotional Distress	YES 398 S.W.2d 270	YES** 855 S.W.2d 619

* *DeLeon v. Hernandez*, 814 S.W.2d 531 (Tex. Ct. App. 1991) (reversing summary judgment against woman who sued husband for assault and battery).

** *Massey v. Massey*, 867 S.W.2d 766 (Tex. 1993) (affirming $362,000 award for emotional distress); *Twyman v. Twyman*, 855 S.W.2d 619 (Tex. 1993).

	Utah	Vermont
Anti-Stalking Laws	YES Utah Code § 76-5-106.5	YES Vt. Stat., tit. 13, § 1061, *et seq.*
Warrantless Arrest for Domestic Violence	YES §§ 30-6-8, 77-36-2	YES Vt. R. Crim. P. 3
Protective Orders	YES §§ 30-6-1, *et seq.*; 76-5-108	YES Tit. 15 § 1101, *et seq.*
Civil Tort: Assault/Battery	YES 915 P.2d 500	YES 477 A.2d 964
Civil Tort: Intentional Infliction of Emotional Distress	YES 358 P.2d 344	YES 392 A.2d 431

	Virginia	Washington
Anti-Stalking Laws	YES Va. Code § 18.2-60.3	YES Wash. Rev. Code § 9A.46.110
Warrantless Arrest for Domestic Violence	YES § 19.2-8, 81	YES § 10.31.100(2)
Protective Orders	YES § 16.1-253.1, *et seq.*	YES § 26.50.01, *et seq.*
Civil Tort: Assault/Battery	YES 491 S.E.2d 718	YES* 943 P.2d 1141
Civil Tort: Intentional Infliction of Emotional Distress	YES 210 S.E.2d 145	YES 530 P.2d 291

* *E.g., Goode v. Martinis*, 361 P.2d 941 (Wash. 1961).

	West Virginia	Wisconsin
Anti-Stalking Laws	YES W. Va. Code § 61-2-9A	YES Wis. Stat. § 940.32
Warrantless Arrest for Domestic Violence	YES § 48-2A-14	YES § 968.075(2)
Protective Orders	YES § 48-2A-1	YES §§ 813.12; 813.122
Civil Tort: Assault/Battery	YES 356 S.E.2d 620	YES 436 N.W.2d 308
Civil Tort: Intentional Infliction of Emotional Distress	YES 289 S.E.2d 692	YES 124 N.W.2d 312

	Wyoming	
Anti-Stalking Laws	YES Wyo. Stat. § 6-2-506	
Warrantless Arrest for Domestic Violence	YES § 7-20-102	
Protective Orders	YES § 35-21-101, *et seq.*; § 6-4-404	
Civil Tort: Assault/Battery	YES 803 P.2d 1358	
Civil Tort: Intentional Infliction of Emotional Distress	YES 803 P.2d 1358	

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IN THE

SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, PETITIONER
v.
ANTONIO J. MORRISON, ET AL.

CHRISTY BRZONKALA, PETITIONER
V.
ANTONIO J. MORRISON, ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

1. Whether 42 U.S.C. 13981, the provision of the Violence Against Women Act that creates a private right of action for victims of gender-motivated violence, is a valid exercise of Congress's power to regulate commerce among the several States.

2. Whether 42 U.S.C. § 13981 is a valid exercise of Congress's power under the Enforcement Clause of the Fourteenth Amendment to the Constitution.

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INTEREST OF THE *AMICUS*[1]

The Center for the Original Intent of the Constitution was formed by the Home School Legal Defense Association in 1998, and now operates under the auspices of Patrick Henry College. The Center holds that the interpretation of the Constitution according to the original intent of the founders is the only safe basis for the preservation of limited government and all rights including those important to our association. The Center exists to systematically research and advocate constitutional interpretation according to the principle of original intent.

In our first brief, we argued that principles of *dual sovereignty*, implicit in the structure of the Constitution, prohibited Congress from abrogating state sovereign immunity in state courts. *Alden v. Maine*, 199 S.Ct. 2240 (1999). In our second brief, we argued that dual sovereignty prohibits Congress from directly regulating state governments through the Commerce Clause. *Reno v. Condon*, No. 98-1464 (S. Ct., argued Nov. 10, 1999). In our third brief, we argued that our Founders did not intend to give Congress spending power to usurp sovereign immunity. *George Mason University v.*

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[1] Pursuant to Rule 37.6, this brief was authored, prepared, and paid for in its entirety by the Center for the Original Intent of the Constitution at Patrick Henry College and the Home School Legal Defense Association. No counsel for a party authored any part of this brief, nor did any person or entity other than *amicus curiae*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

The amicus curiae requested and received the written consents of the parties to the filing of this brief. Such written consents, in the form of letters from counsel of record for the parties, have been submitted for filing to the Clerk of Court. See Sup. Ct. Rule No. 37.3(a).

Litman and United States, No. 99-596 (S. Ct., cert. petition filed Oct. 5, 1999).

Our Founders established a federal government with limited and enumerated powers. The limits on federal power were originally intended to protect the autonomy of the States and the liberties of the people. The Founders viewed vigorous State governments and limited federal government as essential to personal liberty. So do we.

Our interest is to preserve the blessings of liberty for ourselves and our posterity. U.S. Const. Preamble. We seek to do this by holding the federal government to the terms of our original social contract: the Constitution. Faithful adherence to the original intent of the Founders is essential; not because they are ancient and deserve veneration, but because they were the elected representatives of the people. Self-government demands that the intention of the elected Framers should always prevail over the views of unelected judges guided by floating notions of a "living Constitution." Our Founders made promises to the people that ratified the Constitution. Those promises are what is ultimately at stake in this case.

SUMMARY OF THE ARGUMENT

The United States calls 42 U.S.C. § 13981 "classic" civil rights legislation. US Opening Brief, p. 34. The core claim is simple: rape victims cannot count on a fair trial in State courts, so they need a federal forum. Unfortunately, the simplicity of that core issue has been obscured by Congress' compulsive desire to treat everything as "commerce."

Briefs supporting the petitioner draw poignant parallels between the plight of women today and the freed slaves 130 years ago. They remind us that, back then, black victims of violent crime could not get a fair trial in some courts because of local prejudices. They tell us that women cannot get a fair trial in some courts today, because of similar prejudices.

If this is true, why call it commerce? If women cannot get a fair trial in State court, then Congress should be able to provide appropriate federal relief—whether the injustice they suffer costs the nation mere pennies or billions of dollars. If this is really an Equal Protection case, then it should be decided on the basis of Equal Protection law. "Equal justice under law" must never depend on dollar signs.

This law does not regulate interstate commerce as our Founders understood the term. The Commerce Clause—like all the other enumerated powers in Article I, § 8—was drafted to serve one overarching purpose. That purpose was to fulfill the Founders' repeated resolve to empower Congress to legislate on matters the States were "separately incompetent" to handle. Since no individual State can govern commerce between one State and another, the Founders enumerated clear power to do just that. But that clause should *not* be construed to give power to do what the States

can do themselves. While the States are not separately competent to regulate the national economy, they all can—and all do—provide civil remedies for sexual assault.

Giving Congress power to regulate any matter that has a "substantial effect" on the economy is functionally identical to giving Congress a sweeping power to "provide for the general welfare." Virginia (where this case took place) would not have ratified the Constitution if Congress had such power. Patrick Henry and George Mason repeatedly attacked the so-called "sweeping clause" because they feared it gave Congress the power to do *anything*. Virginia ratified the Constitution only because James Madison promised that the power to "provide for the general welfare" was limited to a power to *raise money* to provide for the general welfare.

The Tenth Amendment closes the door on any sweeping power to "provide for the general welfare" under Article I. If Congress has the power to give women a right to sue their attackers in federal court, therefore, that power must have been conferred sometime *after* the Tenth Amendment was adopted. In this case, that power would have to be the Enforcement Clause of the Fourteenth Amendment.

This *amicus* takes no position on whether the Fourteenth Amendment empowered Congress to enact § 13981. Between the Civil War and the ratification of the Fourteenth Amendment, the House of Representatives heard testimony that could certainly lead one to believe they intended to authorize congressional legislation removing cases to federal court. It is not clear whether this legislation was what they would have intended.

It would be tempting to stick to the good old Commerce Clause instead of sailing out on these uncharted waters:

tempting, but wrong. Rape is not commerce. The Violence Against Women Act, 42 U.S.C. §§ 13931 et seq., does not regulate commerce. If it is constitutional, it is constitutional only because it is "appropriate legislation" to enforce equal protection. This Court should reject the Commerce Clause basis for § 13981 and decide this case solely on Enforcement Clause grounds.

ARGUMENT

I.

THE COMMERCE CLAUSE, LIKE EVERY OTHER ENUMERATED POWER, WAS INTENDED TO ENABLE CONGRESS TO LEGISLATE WHERE THE STATES WERE "SEPARATELY INCOMPETENT"

In a recent concurrence Justice Thomas wrote:

> [I]t seems to me that the power to regulate "commerce" can by no means encompass authority over mere gun possession, any more than it empowers the Federal Government to regulate marriage, littering, or cruelty to animals, throughout the 50 States. Our Constitution quite properly leaves such matters to the individual States, notwithstanding these activities' effects on interstate commerce. Any interpretation of the Commerce Clause that even suggests that Congress could regulate such matters is in need of reexamination.
>
> In an appropriate case, I believe that we must further reconsider our "substantial effects" test with an eye toward constructing a standard that reflects the text and history of the Commerce Clause without totally rejecting our more recent Commerce Clause jurisprudence.

United States v. Lopez, 514 U.S. 549, 585 (1995).

A. "SEPARATE INCOMPETENCE" DEFINED

This case is the "appropriate case" Justice Thomas was looking for. On the one hand, Congress has assembled mounds of data documenting how much violence against women ultimately costs, in a good-faith effort to prove that it "substantially effects" commerce. This cannot lightly be ignored.

On the other hand, if the words "Power to … regulate … commerce among the several States" really mean the power to make rape a federal tort, then the actual words of the Constitutional text are effectively meaningless. While such a notion may be popular among the "post-modern" philosophical elite, it cannot be the basis for American constitutional law. "We the people" did not ratify this Constitution to create a Court of philosopher-kings. We ratified the Constitution "to secure the blessings of liberty to ourselves and our posterity." U.S. Const. Preamble.

This case highlights the central problem with the "substantially effects" test. Too many things that "substantially effect" the economy really have nothing to do with commerce. Justice Thomas identified marriage, littering, and cruelty to animals. This Court has accepted *certiorari* in *Jones v. United States*, No. 99-5739 (S. Ct., *certiorari* granted Nov. 15, 1999), an arson case involving a private residence. The House of Representatives has passed a "Religious Liberty Protection Act," H.R. 1691, 106th Cong. (1999), that applies in any case where a substantial burden on religious exercise affects commerce among the several States, even if the burden results from a rule of general applicability. H.R. 1691, § 2. Religion, in the aggregate, has a "substantial effect" on the economy—but does this make religion "commerce"?

There is a better standard for interpreting the Commerce Clause than the "substantially effects" test in *Lopez*. That standard looks to the specific resolutions the Framers agreed to *before* they drafted the Commerce Clause—and all the other enumerated powers—at the Constitutional Convention. We call this standard the "separately incompetent" test.

B. "SEPARATE INCOMPETENCE" AGREED TO

Article I, § 8 was originally crafted to achieve one clear goal: to empower Congress to legislate "in all cases to which the separate States are incompetent." That core concept of the legislative power had been agreed to by the Committee of the Whole right at the start of the Constitutional Convention, and it changed very little over the course of their proceedings. A Committee of Detail eventually replaced the original "separately incompetent" language with a list of enumerated powers, but each of those enumerated powers was clearly chosen to achieve the same goal.

It is easiest to identify the coherent principle of "separate incompetence" by tracing the progress of the Constitutional Convention over the whole course of that long hot summer in Philadelphia. The delegates first met in May, 1787. They chose George Washington to preside on the first working day, Friday, May 25, and drew up rules for the convention on Monday the 28th. It was Tuesday, May 26th, before anyone offered substantive proposals for a Constitution. Edmund Randolph, then Governor of Virginia, had the high honor of opening that main business of the Convention. 1 Madison, James, Journal of the Federal Convention (E.H. Scott ed., 1893), 59 [hereinafter, "Madison's Journal"].

Randolph immediately introduced the "Virginia Plan." Section 6 of that plan gave Congress the power "to legislate in all cases to which the separate States are incompetent, or

in which the harmony[2] of the United States may be interrupted by the exercise of individual legislation." 1 Madison's Journal, *supra,* at 62.

After Randolph had finished speaking, Charles Pinckney, of South Carolina, took the floor. Pinckney offered a different proposal. His draft did not confer any broad, general legislative power. It spelled out, instead, a list of 18 enumerated powers. 1 Madison's Journal, *supra*, 67-69. (Sixteen of Pinckney's proposed powers were eventually incorporated into Article I, § 8 of the Constitution.) One of Pinckney's enumerated powers was "To regulate commerce with all nations, and among the several States." 1 Madison's Journal, *supra*, 68.

While Pinckney's list eventually formed the core of our Article I, the Founders adopted and stuck with the Virginia Plan's "separately incompetent" language throughout the entire first phase of the Constitution drafting process. On May 31, just two days after Pinckney's and Randolph's proposals had each been introduced, the Committee of the Whole adopted the "separately incompetent" language of the Virginia Plan. 1 Elliot, Jonathan, Debates on the Federal Convention (2d ed. 1863), 393 [hereinafter, "Elliot's Debates"]. Debate on Pinckney's proposal was postponed.

---

[2] Since no individual State, acting alone, can ensure the harmony of the United States, this "harmony" strand is a special case of "separate incompetence" which this Court has often addressed under preemption doctrines. Congress generally has the power to preempt State legislation whenever inconsistent State laws would be disruptive. *See Pennsylvania v. Nelson*, 350 U.S. 497 (1956) which looks to (1) the pervasiveness of the federal regulatory scheme; (2) the federal occupation of the field as necessitated by the need for federal uniformity; and (3) the danger of conflict between state laws and the administration of the federal program.

Two weeks later, the Convention still agreed on the basic principles of the proposed legislative power. On June 13, the Committee of the Whole reported out a full working draft of the Virginia Plan, which continued to use the "separately incompetent" formulation. 1 Elliot's Debates, *supra*, 160-61. The Convention, at this time, was still trying to work out the broad brush strokes of the Constitution, not pencil in the fine details. Edmund Randolph articulated the principle that same day:

> Gov. RANDOLPH observed the difficulty in establishing the powers of the judiciary. The object, however, at present, is to establish this principle, to wit, the security of foreigners where treaties are in their favor, and to preserve the harmony of states and that of the citizens thereof. This being once established, it will be the business of a subcommittee to detail it; and therefore moved to obliterate such parts of the resolve, so as only to establish the principle, to wit: "That the jurisdiction of the national judiciary shall extend to all cases of national revenue, impeachment of national officers, and questions which involve the national peace or harmony." Agreed to unanimously.

1 Elliot's Debates, *supra*, 409.

The Convention followed Randoph's principle of "establishing the principle," leaving the details to a subcommittee. On June 19, the Committee of the Whole again submitted the Virginia Plan, as amended. Thus, after the first month's work, the delegates had not wavered from their original vision of a Congress empowered to "legislate in all cases to

which the separate states are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation." 1 Elliot's Debates, *supra*, 181.

C. "Separate Incompetence" Expanded

This agreement in principle remained unchanged for the next four weeks. It was not until mid-July that this working resolution came under more scrutiny. Though the delegates still agreed in *principle* about the scope of the legislative power, they began to express increasing concern about details. On July 16th, the following colloquoy took place:

> "And moreover to legislate in all cases to which the separate States are incompetent; or in which the harmony of the United States may be interrupted by the exercise of individual legislation," being read for a question,—
>
> Mr. BUTLER calls for some explanation of the extent of this power; particularly of the word incompetent. The vagueness of the terms rendered it impossible for any precise judgment to be formed.
>
> Mr. GORHAM. The vagueness of the terms constitutes the propriety of them. We are now establishing general principles, to be extended hereafter into details, which will be precise and explicit.

1 Madison's Journal, *supra*, 357.

Connecticut's Roger Sherman was not comforted by Mr. Gorham's assurances. Sherman remained unsettled by the

vagueness in Section 6. The next day, July 17, Sherman proposed to replace the "separately incompetent" language with a different definition. He read out his definition, and supplemented it with a list of enumerated powers to explain what his definition meant:

> Mr. SHERMAN observed, that it would be difficult to draw the line between the powers of the General Legislature, and those to be left with the States; that he did not like the definition contained in the Resolution; and proposed, in its place ... to insert "to make laws binding on the people of the United States in all cases which may concern the common interests of the Union; but not to interfere with the government of the individual States in any matters of internal police which respect the government of such States only, and wherein the general welfare of the United States is not concerned."
>
> Mr. WILSON seconded the amendment, as better expressing the general principle.
>
> Mr. GOUVERNEUR MORRIS opposed it. The internal police, as it would be called and understood by the States, ought to be infringed in many cases, as in the case of paper-money, and other tricks by which citizens of other States may be affected.
>
> Mr. SHERMAN, in explanation of his idea, read an enumeration of powers, including the power of levying taxes on trade, but not the power of direct taxation.

1 Madison's Journal, *supra*, 361-62.

The Convention was not ready to replace the "separately incompetent" language with Sherman's new "common interests without interference" formulation. Nevertheless, Sherman had made some headway. Gunning Bedford, Jr., of Delaware, suggested an addition to Randolph's original language:

> Mr. BEDFORD moved that the second member of the sixth Resolution be so altered as to read, "and moreover to legislate *in all cases for the general interests of the Union*, and also in those to which the States are severally incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation."

1 Madison's Journal, *supra*, 362 [*emphasis supplied*].

Edmund Randolph, who had shepherded the "separately incompetent" language along this far, was not happy about this addition of a broad "general interests" power. He said:

> Mr. RANDOLPH. This is a formidable idea, indeed. It involves the power of violating all the laws and Constitutions of the States, and of intermeddling with their police. The last member of the sentence is also superfluous, being included in the first.
>
> Mr. BEDFORD. It is not more extensive or formidable than the clause as it stands: no State being separately competent to legislate for the general interest of the Union.

1 Madison's Journal, *supra*, 362.

Virginia, under Randolph's influence, voted against adding the new power, but Bedford's motion to amend passed by a vote of 6 to 4. Though Virginia still did not much care for the new power, that did not keep it from joining with seven other States in agreeing to the now-amended version. Only South Carolina and Georgia opposed it. 1 Madison's Journal, *supra*, 363.

The amended language was broader than Randolph had originally planned, but the proposed legislative power could still be accurately characterized as a power to legislate where the States were "separately incompetent." As Bedford noted, no individual State could really legislate "for the general interests of the Union," even if each State could effectively legislate for its own interests. But the need for detail was now clearer than ever.

D. "Separate Incompetence" In Detail

Although the amended language troubled Randolph, he soon found a way to harmonize it with his original wording. He got appointed to the five-member Committee of Detail. *See* 1 Elliot's Debates, *supra*, 217. On July 26, all of the constitutional proposals that had been adopted to date were referred to this Committee. *Ibid*, at 221. The Committee was also entrusted with Charles Pinckney's original proposal, including his list of enumerated powers of Congress. *Ibid*, at 223.

On Aug. 6, the Committee of Detail reported out the first draft of the Constitution. This committee had replaced all the "separately incompetent" language with a list of specific powers of Congress. The majority of these powers were the very same ones that had originally been proposed by Pinck-

ney. The only power completely left out was the power to to establish a national university.

The first draft of enumerated powers were well received, as far as it went. The Committee of the Whole added "and post roads" to one clause and dropped "and emit bills" from another. 1 Elliot's Debates, *supra*, 245. On Aug. 18th, however, nineteen additional powers were proposed, which were promptly handed off to the very same Committee of Detail. *Ibid*, at 247-48.

One of the proposed powers was to "To grant charters of incorporation in cases where the public good may require them, and the authority of a single state may be incompetent." 1 Elliot's Debates, *supra*, 247. The proposed incorporation power (which was not adopted and which was destined to remain a very controversial topic for years to come) took a broad view of the principle of "separate incompetence" of the individual states. That proposal was rejected.

Other proposals that failed to make the grade were the powers "to establish a university" and "to establish seminaries for the promotion of literature, and the arts and sciences." 1 Elliot's Debates, *supra*, 247. Pinckney had proposed such power at the start, but Randolph's Committee rejected it. When it was sent back to the Committee a second time, it fared no better. A federal university might advance the "general interests" of the United States, but individual States were "separately competent" to handle that.

The powers that *were* added were all powers that no individual State could carry out. Power to pay the debts of the United States was unanimously areed to. 1 Elliot's Debates, *supra*, 258. A power to regulate bankruptcy was added on Aug. 29th (p. 272). Power to admit new States to the Union

was approved on Aug. 30th, as was the power to govern federal territory (p. 275). All of these fit the overall goal of giving Congress power to do what the States could not.

On Sept. 5th, a Committee of Eleven reported out the final proposals for amendments to the legislative power. These included the power to govern what ultimately became the District of Columbia and the Patent and Copyright Clauses. 1 Elliot's Debates, *supra*, 285. Once again, these new powers went beyond what any State could accomplish on its own. (A given State might grant a patent to an inventor, but that patent would obviously be more effective if it applied nationwide.)

By Sept. 12th, every clause in Article 1, § 8 was present in its final form. 1 Elliot's Debates, *supra*, 300-301. (The only significant difference from our present Constitution was that the draft still gave Congress power to appoint a Treasurer, which had been on Pinckney's original list.) Each of the enumerated powers had been selected according to the same overall plan: they were intended to empower Congress to do what the States were "separately incompetent" to do.

E. "Separate Incompetence" Applied

The rule during the drafting process was simple: if the States could do it, Congress could not. If the States could not do it, Congress could. We are no longer drafting a Constitution, however, but applying one that has been written and ratified. The Tenth Amendment closed off the Founders' option of adding new powers whenever Congress ran short.

The rule today, therefore, in light of enumerated legislative powers and an explicit Tenth Amendment, must be as follows: "If the States can do it, Congress usually may not.

If the States can not do it, Congress usually may." Each "usually" is dictated by the doctrine of enumerated powers. Congress usually may not act where the States are separately competent, but if an enumerated power unmistakably authorizes Congress to act, then it can. Likewise, Congress usually may act where the States are separately incompetent to do so, but if no enumerated power reasonably applies, Congress cannot just make one up to fill the need.

The commerce power should be applied in light of this rule. Is Congress regulating commercial transactions that involve more than one State? Since the States are separately unable to regulate such transactions, Congress should be able to do so. Is Congress regulating activity within the conceded jurisdiction and competence of the States? Since the States are separately able to regulate such activity, Congress should *not* be able to do so.

Rape is vile, but it is neither commercial nor interstate. If Virginia is able to provide equal protection for rape victims in State court, then Congress should not be able to step in just because of an alleged aggregate impact on the national economy. If, on the other hand, Virginia is *not* able to provide equal protection for her own citizens but Congress can, then this law should be upheld on Enforcement Clause grounds. Either way, the Commerce Clause should never be the basis for a regulation of rape.

ARGUMENT

II.

A POWER BROAD ENOUGH TO REGULATE RAPE IS A SWEEPING POWER TO "PROVIDE FOR THE GENERAL WELFARE" OR PASS ANY "NECESSARY AND PROPER LAW"

This *amicus* detests rape and all forms of violence against women. A *State* law against rape is necessary, proper, and advances the general welfare of the State. But a *federal* rape law is not constitutional unless it is necessary and proper to carry out some specific enumerated power.

Section 13981 is *not* a regulation of interstate commerce. It would be more honest to admit that it is an attempt to exercise a free-standing power to "provide for the general welfare," or to make all laws which are "necessary and proper." These are the "sweeping clauses" which Patrick Henry feared and James Madison repudiated. This Court has never upheld a bare exercise of the "sweeping clauses," and it should not do so now.

A. "NECESSARY AND PROPER" IS NOT ENOUGH

If Congress had expressly pinned its hopes directly on the Necessary and Proper Clause, this case would be easy to decide. Since *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819), it has been clear that the Necessary and Proper Clause *enhances* the enumerated powers, but does not add a power of its own.

In *McCulloch*, Chief Justice Marshall wrote: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly

adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *McCulloch*, 17 U.S. (4 Wheat), at 421. Marshall's reading of the Necessary and Proper Clause reflects the Framers' stated intention to give Congress power to legislate in "all cases for the general interests of the Union," without rejecting the basic design of *enumerated* powers. Marshall believed in a strong yet *limited* federal government.

Marshall had an expansive view of the Commerce Clause, for his day, but not one that would include the power to regulate rape. In *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), Marshall defined commerce as "intercourse," and concluded that Congress had power to regulate "that commerce which concerns more states than one." *Gibbons*, 22 U.S. (9 Wheat.) at 189, 194. Marshall could never have imagined that Congress might try to include *sexual* intercourse within that power.

B. "GENERAL WELFARE" IS NOT ENOUGH

This law cannot be upheld as an exercise of a free-standing power to "provide for the general welfare." That power, as James Madison insisted in the Virginia Ratification Debates, could only be exercised in the context of the whole clause.

> I shall take notice of what the honorable gentleman [Patrick Henry] said with respect to the power to provide for the general welfare. The meaning of this clause has been perverted, to alarm our apprehensions. The whole clause has not been read together. It enables Congress "to lay and collect taxes, duties, imposts, and excises; to pay the debts and provide for the common defence and gen-

> eral welfare of the United States; but all duties, imposts, and excises, shall be uniform throughout the United States." The plain and obvious meaning of this is, that no more duties, taxes, imposts, and excises, shall be laid, than are sufficient to pay the debts, and provide for the common defence and general welfare, of the United States.

3 Elliot's Debates, *supra*, 206.

C. THE "SUBSTANTIAL EFFECTS" TEST CREATES A "SWEEPING CLAUSE"

It is to Congress' credit that it does not try to pretend that this law is a valid exercise of either of these "sweeping clauses." Congress recognizes that neither the Necessary and Proper Clause nor the General Welfare Clause can be the basis for a nationwide rape law. But what is the difference between these "sweeping clauses" and the Commerce Clause, as applied to a non-commercial intrastate sex act solely because of an aggregated, indirect economic effect?

A Commerce Clause that permits federal regulation of any activity, so long as Congress can muster testimony alleging that it "substantially effects" the economy, is just the same old "sweeping clause" that Patrick Henry fought and James Madison repudiated. This Court should therefore reject the "substantially effects" test and replace it with a test that is truer to the text and history of the Commerce Clause. We recommend the "separately incompetent" test that our Founders intended.

ARGUMENT

III.

THIS LAW SHOULD BE UPHELD ON ENFORCEMENT CLAUSE GROUNDS OR NOT AT ALL

If Congress can really regulate rape on the basis of its ultimate effect on the economy, then this Court should just unchain the Necessary and Proper Clause and/or the General Welfare Clause and be done with it. But we believe this Court should decide this case solely on Enforcement Clause grounds.

A. VICTIMS WITHOUT COMMERCE

The "separately incompetent" standard says, "If the States cannot separately accomplish a goal, then Congress usually can." That formulation forces us to consider what goal we are pursuing. Is the goal just to create a civil cause of action for victims of sexual violence? No, the States can do that on their own. Our goal must be to accomplish something the States cannot do themselves. The goal of § 13981 is to ensure the equal protection of the laws. As we shall see, we cannot really achieve that goal by stretching the Commerce Clause.

Commerce cannot really do the job. The commercial impact of rape, according to the legislative record, largely focuses on the effect of rape on a woman's ability to get and keep a job. If sexual violence against women is bad, what about sexual violence against children? That is as bad or worse. Yet sexual violence against women has an economic impact that sexual violence against children apparently lacks. Children who are raped do not cut into the national economy,

because they are not in the work force. This Court should not adopt a Commerce Clause rule that would uphold the Violence Against Women Act but strike down a "Violence Against Children Act" as unconstitutional.

The same logic applies to women who are illegal immigrants. An *amicus* brief that was filed by various immigrant women's groups[3] painted a tragic picture of victimized illegal immigrants who dare not seek legal protection. But illegal immigrants, like minor children, are not *supposed* to be employed in this country. There should be no discernible economic impact from sexual violence against illegal immigrants or underaged children. But a Commerce Clause basis for this law would mean that Congress could not pass a law that protects illegal immigrants and children from sexual violence.

The Fourteenth Amendment was enacted to protect all *persons*, not just adults legally residing within the United States. Congress is trying to protect *persons* here, not commerce. We applaud that goal. If the States *cannot* assure women of a fair trial in their own civil courts, but Congress *can*, then Congress should do so, whether or not it effects commerce. This case should turn on the States' ability to ensure *justice*, not *commerce*.

---

[3] Brief of *Amici Curiae* AYUDA, Inc., Asian & Pacific Islander American Health Forum, Asian/Pacific Islander Domestic Violence Resource Project, The National Association of Women Lawyers, Project Esperanza, Refugee Women's Network, Inc., Sakhi For South Asian Women, Sanctuary For Families' Center For Battered Women's Legal Services, S.T.O.P.D.V., Inc., Asian Women's Shelter, Barrier Free Living, Daya Inc., Manavi, New York Asian Women's Center and Saheli in Support of Petitioner.

B. RACE THEN, GENDER NOW

Our "separately incompetent" standard would have been easy to apply in 1867. The freed slaves were being systematically terrorized and the southern States were—to put it charitably—"separately incompetent" to protect them. Major General Thomas J. Wood testified before the House of Representatives on January 28, 1867, about his experiences as Military Commander of the "Department" of Mississisipi:

> Q: Without change in the administration of justice, what, in your judgement, is the prospect of affairs in that state in respect to the future?
>
> A: Taking the whole code of laws of Mississippi, civil and criminal, including the police laws, which discriminate between the white men and black men, and taking the condition of public sentiment with the masses of people, although there are some good people disposed to do justice, I do not think the administration of justice, as the laws are applied, is sufficient to secure the rights of liberty and property and the pursuits of peace to the freed people.
>
> Q: Could you suggest any remedy for these difficulties?
>
> A: Of course, it would be merely a matter of opinion, and perhaps not worth a great deal. The result of my observation in Mississippi led me to the conclusion that there should, by legislation of the government, be established some system by which, when the local courts fail to administer justice, some higher power

> could be brought into play to secure it. Of course, I do not go into details as to any particular plan. If a flagrant outrage is committed, and the local courts fail to take cognizance, or taking cognizance, their decision is flagrantly in violation of justice, there should be some revisionary power, I do not say whether civil or military—that is for the legislature to decide—under which these offenders should be brought to justice.

H. Rep. No. 23, 39th Congress, 2nd Session, pp. 29-31 (1867).

The "separately incompetent" test was easy to apply in 1867, but not very satisfying. Congress did *not* have any enumerated power that it could use to protect the freed slaves from Mississippi's flagrant violation of their rights. That is why the Fourteenth Amendment was adopted. Once it was ratified, on July 9, 1868, the "separately incompetent" test again became easy to apply. Now Congress had the power to do what the southern States, separately, had refused to do.

In this case, a black man is accused of raping a white woman in Virginia. In 1868, such a man would be unlikely to get to the courthouse alive. If he did, he knew what he could expect from a white judge and a white jury. A black rape defendant in Virginia in 1868 would usually have been better off in a federal court.

It is not so clear that he would be better off today. If federal courts are inherently superior to State courts, then he would be. In that case this law would result in the best of all worlds: women victims would be more likely to prevail, while *innocent* black defendants would be more likely to be

acquitted. Every innocent party would be better off (statistically speaking), and every guilty party would be worse off.

C. JUSTICE, NOT COMMERCE

That assumes, however, that federal courts are inherently superior to State courts. While that was true for black men in Virginia's courts in 1868, it is not so obviously true today. Congress's power to provide better justice, if it is available, does not include a power to essentially the same justice in a different court.

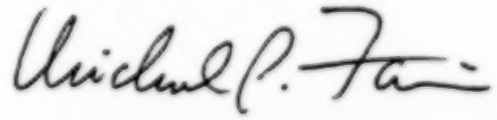
By contrast, a Commerce power that is available any time an activity "substantially affects" the economy does not require any showing that Congress can do a better job than the States can. That is why this case should be decided on Enforcement Clause grounds, not Commerce Clause grounds. Our Founders would want this law upheld if Congress really could accomplish what the individual States could not, but they would want this law struck down if invaded the residuary authority of the States. The Commerce Clause, under the "substantially affects" test, does not distinguish between these situations. The Enforcement Clause should.

When Congress is regulating true interstate commerce, it would be inappropriate for this Court to ask whether it is doing a better job than the individual States might do. But when Congress takes over the job of providing justice for rape victims, that becomes the question that ultimately matters.

CONCLUSION

We take no position on whether this is appropriate legislation under the Enforcement Clause. If Congress really can provide equal justice for black men and white women where the separate States cannot, then our Founders would approve of this law, whether or not it has a "substantial effect" on interstate commerce. This law should therefore stand or fall on Enforcement Clause grounds, not on the basis of the Commerce Clause.

Respectfully Submitted,



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v.

ANTONIO J. MORRISON, ET AL.,

Respondents.

UNITED STATES OF AMERICA,

Petitioner,

v.

ANTONIO J. MORRISON, ET AL.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

BRIEF OF AMICUS CURIAE INDEPENDENT WOMEN'S FORUM IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The Independent Women's Forum ("IWF") is a nonprofit, nonpartisan organization founded by women to foster public education about legal, social and economic policies, particularly those affecting women and families. IWF supports policies that promote individual responsibility, limited government, and economic opportunity.

IWF has sponsored public debate, provided legislative analysis, and offered congressional testimony criticizing the Violence Against Women Act, 42 U.S.C. § 13931, *et seq.*, ("VAWA"), and its civil remedy provision, 42 U.S.C. § 13981. IWF believes the provisions of VAWA are largely, and expensively, ineffective at preventing and punishing violent crime. Fundamental principles of federalism require that States retain their right and obligation to regulate local and purely private activities. U.S. Const. amend. X. The Constitution forbids the federal government from encroaching on State powers precisely so that citizens may demand from local governments a level of service and protection that suits their own needs. IWF believes that the personal safety of women and other citizens will be best secured by encouraging local enforcement and prosecution of violent crimes.

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[1] In accordance with Supreme Court Rule 37.6, amicus curiae represents that no counsel for a party authored this brief in whole or in part, and no person or entity, other than amicus, has made any monetary contribution to the preparation or submission of this brief. All parties to these consolidated cases have consented to the filing of this brief urging affirmance, and the letters of consent have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

INTRODUCTION AND SUMMARY OF ARGUMENT

The United States Court of Appeals for the Fourth Circuit correctly concluded on rehearing *en banc* that 42 U.S.C. § 13981 unlawfully extends Congressional power into areas traditionally reserved to the States in violation of well-settled principles of federalism and this Court's analysis in *United States v. Lopez*, 514 U.S. 549 (1995). It correctly discerned that reliance on the Commerce Clause to support VAWA lacks any logical limits and would justify almost any exercise of Congressional authority over any activity that could be found to have some remote economic effect.

Plaintiffs and their amici here argue for the same expansive definition of the commerce power rejected in *Lopez*. Under their proposed definition, wherever economic effects (however attentuated) could be discerned, Congress would have authority to regulate and potentially to occupy the field, even if that field were the civil and criminal justice systems of all states. The *Lopez* court confirmed prior jurisprudence rejecting any general police power vested in the federal government by the Constitution. Yet, Congress relied explicitly on what can only be reasonably characterized as an assertion of police power in enacting VAWA. Plaintiffs' belated attempt to justify VAWA's civil remedy under the Necessary and Proper Clause, an argument not raised before the Fourth Circuit, cannot save VAWA from judicial scrutiny because if the outer limits of the Commerce Clause have been exceeded, VAWA is not "necessary and proper" to the exercise of power under the Commerce Clause.

The Fourth Circuit also correctly rejected the argument advanced by Plaintiffs that Congress could enact the VAWA under § 5 of the Fourteenth Amendment. If the state action requirement of the Fourteenth Amendment is

ever discarded, this Court will have untethered its jurisprudence both from the text and history of the Fourteenth Amendment and will have created an unauthorized general federal police power.

ARGUMENT

1. Congress Lacks The Authority Under The Commerce Clause To Enact The Violence Against Women Act.

The Court in *Lopez* recognized that without an enforceable requirement that the subject matter regulated either be truly economic in nature or directly affect economics, the Commerce Clause would be without any coherent limitation that could be squared with settled conceptions of federalism.

> We pause to consider the implications of the Government's arguments. The Government admits, under its 'costs of crime' reasoning, that Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce. Similarly, under the Government's 'national productivity' reasoning, Congress could regulate any activity that it found was related to the productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the theories that the Government presents in support of [18 U.S.C.] § 922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States have

> historically been sovereign. Thus, if we were to accept the Government's arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate.

514 U.S. at 564. Here, Plaintiffs and their amici offer the same or indistinguishably similar arguments about economic effects that this court found insufficient in *Lopez*. *See, e.g.*, Brzonkala Brief at 28-29; United States Brief at 6-8. *See also Lopez*, 514 U.S. at 563-64.

In *Lopez*, the Court identified four considerations to be examined when inquiring whether the regulated activity "substantially affects" interstate commerce: (1) whether the regulation of the activity is an essential part of a larger regulation of economic activity, in which the regulatory scheme would be undercut unless the intrastate activity were regulated; (2) whether the statute under which Congress regulates contains a jurisdictional element of interstate commerce; (3) Congress' formal legislative findings; and (4) the impact of the regulation on areas in which the States have traditionally been sovereign. 514 U.S. at 559-64. It is axiomatic that the "regulation of noneconomic conduct remote from interstate commerce," *Brzonkala v. Virginia Polytechnic Inst. and State Univ*, 169 F.3d 820, 840 (4th Cir. 1999), fails the *Lopez* analysis because "[t]he power to 'legislate generally upon' life, liberty, and property . . . [is] 'repugnant' to the Constitution." *City of Boerne v. Flores*, 521 U.S. 507, 525 (1997) (citation omitted). The Fourth Circuit properly weighed these factors in finding that VAWA was not economic regulation. VAWA is not a part of any larger scheme of economic regulation and it manifestly lacks any jurisdictional requirements linked to interstate commerce. Its intrusion into areas of traditional state concern easily outweighs Congress' findings of

commercial impact, findings which are in any event predicated on the same limitless definition of what commerce means rejected in *Lopez*.

(a) The Areas In Which The States Have Traditionally Been Paramount Should Be Protected Against A Federal Claim To Regulate Anything That Remotely Affects Commerce.

The ultimate justification for keeping areas of domestic relations, criminal law, and education in local hands rests both on principle and prudence. *Lopez*'s conclusion that federalism must be maintained is sound in principle because that is what the Constitution says and is what the Founders intended. That conclusion is also reinforced by prudential concerns of particular interest to the IWF. The IWF submits that the presence of significant institutional capacities at the state level for dealing with family policies, and a minimal level of federal competence and experience in this area, makes sporadic federal intrusions in service of symbolism and "feel good" politics an undesirable policy.

In *Ankenbrandt v. Richards*, 504 U.S. 689, 703-04 (1992), this Court noted that the domestic relations exception to federal court jurisdiction rests not only on respect for long-held understandings but also on sound policy considerations. State courts already have the close association with state and local organizations that handle the issues that arise from conflicts over divorce, alimony, and child custody and support decrees. Moreover, state courts have a special proficiency developed over the past century and a half in handling these issues.

Moreover, allowing comprehensive federal regulation in such an area under the guise of the commerce power would offend the constitutional scheme in the additional sense that the function of the states as laboratories of public policy, particularly in areas where they have special expertise, would be negated by uniform, "top-down" solutions. *See Lopez*, 514 U.S. at 581 (Kennedy, J., concurring). While no reasonable person supports violence against women any more than threats of firearms in schools, there can be considerable differences of opinion about how to address the problem. "In this circumstance, the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear." *Id.*

(b) Congress Has Improperly Asserted A Claim To A General Police Power In The Act And Plaintiffs Are Proposing That Congress Be Permitted To Determine The Scope of Its Own Commerce Power Contrary To The Fundamental Principle Of Judicial Review.

When VAWA was passed, Congress explicitly invoked promotion of public safety and health as one justification for the Act. *See* 42 U.S.C. § 13981(a). While as a matter of strict legal analysis this Court may regard the Congressional claim of a power to legislate on grounds of health and safety as surplusage if actual sources of Congressional authority are sufficient, the claim to an exercise of police power invites and requires careful scrutiny, for an important precedent is being set. Furthermore, given the anti-Federalist bias reflected in VAWA, this Court should not be surprised to find that 42 U.S.C. § 13981 contains no limiting jurisdictional

requirement, *Brzonkala*, 169 F.3d at 869-70, one of the obligatory factors to be considered under *Lopez*. *Lopez*, 514 U.S. at 564-66. *See also* United States Brief at 32 n.15.

Congress did, of course, state in 42 U.S.C. § 13981 its secondary reliance on the Commerce Clause and the House of Representatives did declare that "crimes of violence motivated by gender have a substantial effect on interstate commerce." H.R. Conf. Rep. No. 103-711, at 385 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1839, 1853. And certainly such recitations and findings should be considered under *Lopez*. But, as this Court has observed, simply because Congress concludes that a particular activity substantially affects interstate commerce does not make it so. *Lopez*, 514 U.S. at 557 n.2. Permitting Congress to set the scope of its own power violates the principle of judicial review set out in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). *United States v. Wilson*, 73 F.3d 675, 679 (7th Cir.), *cert. denied*, 519 U.S. 806 (1996). Whether particular activities affect interstate commerce sufficiently to come within the power of Congress to regulate them pursuant to the Commerce Clause is a judicial, not a legislative, question. *Lopez*, 514 U.S. at 557 n.2. Congress may not use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities. *Id.* at 558. In this case, this Court should continue to heed the Framers by treating Congressional claims of omnicompetence with skepticism.

> It will not be denied, that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it.
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> The founders of our republics . . . seem never for a moment to have turned their eyes from

the danger to liberty from the overgrown and all-grasping prerogative of an hereditary magistrate, supported and fortified by an hereditary branch of the legislative authority. They seem never to have recollected the danger from legislative usurpations; which by assembling all power in the same hands, must lead to the same tyranny as is threatened by executive usurpations . . . . [It] is against the enterprising ambition of this department, that the people ought to indulge all their jealousy and exhaust all their precautions. 'The legislative department derives a superiority in our governments from other circumstances. Its constitutional powers being at once more extensive and less susceptible of precise limits, it can with the greater facility, mask under complicated and indirect measures, the encroachments which it makes on the coordinate departments. It is not unfrequently a question of real-nicety in legislative bodies, whether the operation of a particular measure, will, or will not extend beyond the legislative sphere.'

Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 253, 273-74 (1991) (quoting *The Federalist No. 48* 332-34 (J. Cooke ed. 1961)).

(c) The Alleged Approval Of The Act By Certain State Officials Is Constitutionally Irrelevant.

This Court has observed that "'the States occupy a special and specific position in our constitutional system . . .

.' The 'constitutionally mandated balance of power' between the States and the Federal Government was adopted by the Framers to ensure the protection of 'our fundamental liberties.'" *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (citations omitted). The invitation of certain state Attorneys General, holding their places for the moment, to uphold federal regulation in this area, Brzonkala Brief at 17; United States Brief at 12 n.5; State Attorneys General Brief at 1, and the similar appeals of state gender task forces, United States Brief at 9-11, 47-48; Brief Amici Curiae of the States of Arizona, *et al.*, at 19-20; Brief Amici Curiae of Law Professors at 22 n. 28, are simply irrelevant to constitutional analysis. As this Court held in *New York v. United States*, 505 U.S. 144, 181-82 (1992), the consent of state officials cannot revive a constitutionally infirm Congressional enactment. Separation of powers is a principle of constitutional hygiene which no official of the day can give away.

> The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals . . . . The constitutional authority of Congress cannot be expanded by the 'consent' of the governmental unit whose domain is thereby narrowed, whether that unit is the Executive Branch or the States . . . . State officials thus cannot consent to the enlargement of the powers of Congress beyond those enumerated in the Constitution.

New York, 505 U.S. at 181-82. The Constitution withholds power from the officials at all levels of government to alter the constitutional scheme on the well-founded suspicion that temporary political expediency will sometimes triumph over enduring principles. *See id.* at 182-83.

(d) Plaintiffs And Their Amici Misuse "Legislative History."

Plaintiffs and their amici argue at length that evidence heard by Congress should be deemed highly persuasive on the wisdom of VAWA's intrusion into the powers of the several States. *See, e.g.*, Brzonkala Brief at 10-17; United States Brief at 28-32. This is a clear misuse of "legislative history."

This Court has stated that in using legislative history it is the Committee Reports on the bill that represent the considered and collective understanding of the members involved. *Garcia v. United States*, 469 U.S. 70, 76 (1984). The Court has eschewed reliance on the comments of a single member. *Compare Garcia*, 469 U.S. at 76, *with* Brief Amicus Curiae of Senator Joseph R. Biden, Jr., at 12 n.14. Certainly, it cannot be presumed that committee reports issuing from only one house of Congress years before the statute in question was actually passed somehow establish the "intent" of a later Congress. *See Shannon v. United States*, 512 U.S. 573, 583 (1994) (observing that members of this Court have differing views on the role of legislative history even when it is comprehensive and accurate); Brief Amicus Curiae of Senator Joseph R. Biden, Jr., at 1-2 (noting that three different Congresses were involved in VAWA). Hence, a recitation of what members of Congress merely heard, *see, e.g.*, United States Brief at 7-8 & n.3-4 (hearings); Brzonkala Brief at 11-12 (statements of non-members), is not authority for what Congress found. *See*

Landgraf v. USI Film Prods., 511 U.S. 244, 263 n.15 (1994) (partisan statements carry little weight). Here, one house made no finding at all of any substantial effect on interstate commerce. *See Brzonkala*, 169 F.3d at 850.

Nor is the matter much advanced by citing "legislative history" to support Plaintiffs' pseudo legal reasoning and terminology. They use the terms "systemic" bias, United States Brief at 50 n.23, and "systemic" discrimination, Brzonkala Brief at 14-15, 43, which are vague terms borrowed from employment law. *See, e.g.*, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 245 (1989) (Title VII); *E.E.O.C. v. Shell Oil Co.*, 466 U.S. 54, 58 (1984) (employment); *Cannon v. University of Chicago*, 441 U.S. 677, 706 (1979) (Title IX). These terms lack any evident connection to the constitutional issues at hand, beyond seeking to establish a pejorative tone. Moreover, even in discrimination cases, this Court has consistently rejected the argument that societal discrimination alone warrants inattention to constitutional requirements. See *United States v. Virginia*, 518 U.S. 515, 547 (1996).

The Commerce Clause imposes its own requirement of a reasonable relationship between the end and the means. The discretion accorded Congress under the Commerce Clause "is subject to only one caveat - that the means chosen by it must be reasonably adapted to the end permitted by the Constitution." *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 262 (1964).

If mere congressional findings alleging disparities in treatment in tortfeasors and criminals by the legal systems of the various States were sufficient to invoke plenary federal power to legislate in the field, there would be no limit on federal authority. Such a sweeping claim is no more plausible than, to use the example employed by the Fourth

Circuit, to establish a national regulatory authority over commercial effects of insomnia. *See Brzonkala*, 169 F.3d at 839.

Interestingly, if a remote effect on economics is all that matters under the Commerce Clause, then Congress could just as easily have adopted a bill intended to particularly protect men instead of adopting the VAWA. Men are 77.1% of murder victims. Federal Bureau of Investigation, *Crime in the United States: 1993 Uniform Crime Reports* at 16. Even apart from murder, men are much more likely to be victims of violent crime. Bureau of Justice Statistics, *Criminal Victimization in the United States 1993* (May 1996) (NCJ-151657) at 10 Table 2 (violent crime rate is 60.9 per thousand for males and 42.3 per thousand for females). Except for rape/sexual assault, the victimization rate for every category of violent crime was higher for males than females. *National Crime Victimization Survey: Criminal Victimization 1994* (Apr. 1996) (NCJ-158022) at 5.

Furthermore, men are punished more severely than women. Women generally receive substantially shorter average sentences than do men for the same crimes. Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics 1993* (1994) at 615. Approximately 95.5% of state prison inmates are men. *Id.* at 611. Among federal prisoners, 92.3% are men. *Id.* at 628. And men killing their wives receive substantially longer sentences (excluding life sentences and the death penalty) than do women who kill their husbands, with sentences for unprovoked spousal killings averaging seventeen years for men compared to seven for women. Bureau of Justice Statistics, *Spouse Murder Defendants in Large Urban Counties* (Sept. 1995) (NCJ-156831) at 3.

Besides relying on advocacy research, Plaintiffs and their amici, like the groups that originally supported VAWA before Congress, have omitted some key facts. Most violent crime is committed by men, against men. The Bureau of Justice Statistics reports that over 67% of homicides are male-on-male. U.S. Department of Justice, Bureau of Justice Statistics, *Homicide Trends in the U.S.: Gender* (last modified Jan. 4, 1999) (http: //www.ojp.usdoj.gov/bjs/homicide/gender.htm.) For every violent crime except rape, males are victimized at higher *rates* than females. Bureau of Justice Statistics, *Victim Characteristics* (last modified Jan. 2, 1999) (http://www/oip.usdoj.gov/bjs/cvict_v.htm.) Looking at activities that might arguably involve "interstate commerce," males are more likely than females to be victims of workplace violence, Bureau of Justice Statistics, *Workplace Violence: 1992-1996*, (July 1998) (NCJ 168634) at 2, 6, and violence while traveling. Bureau of Justice Statistics, *Sex Differences in Violent Victimization* (Sept. 1997) (NCJ-164508) at 8. ("Females were more likely to be victimized in a private home ... than any other place.") Over 90% of workplace fatalities are males. Bureau of Labor Statistics, *Fatal Occupational Injuries by Selected Worker Characteristics and Event or Exposure* (1994) at 1. (last modified July 29, 1996) (http://www.bis.gov./cfoi/cftb0028.txt). The reports of disparity in workplace murder *rates* result from the fact that men are killed by many other causes (*e.g.*, accidents), which affect women less. *See* Kingsley R. Browne, *Sex and Temperament in Modern Society*, 37 Ariz. L. Rev. 971, 979 (1995). Given the large disparity in victimization rates, it seems most unlikely that the costs of violent crime against women exceed, or are even disproportionate to, the costs of violence against men.

The only violent crimes that disproportionately victimize women, rape and sexual assault, have declined

steadily since 1980. This remains true even though "rape" was recently redefined to include attempts, verbal threats, and "psychological coercion" in the National Crime Victimization Survey. Bureau of Justice Statistics, *Rape Trends* (last modified Jan. 14, 1999) (http://www.ojp.usdoj.gov/bis/glance/rape.htm.) Reported rapes on campuses are a minute percentage of total enrollments (*e.g.*, less than 500 of 5,000,000 total enrollment). Even assuming that only a small percentage of rapes are reported, the campus rate is well below one percent. Neil Gilbert et al., *Was It Rape? An Examination of Sexual Assault Statistics* 11 (1995); Federal Bureau of Investigation, *Crime in the United States: Uniform Crime Reports* 158-67 (1994).

VAWA provides grant incentives for states to adopt mandatory arrest policies, 42 U.S.C. § 3796hh, which require police to make an arrest of the partner they judge to be at fault (or even both partners) when called to a domestic assault scene. These policies have produced an unexpected result: substantial increases in arrests of women. Advocates and social scientists suggest various explanations, but "virtually no one claims to fully understand the phenomenon, which mystifies because it so diverged from the widely accepted estimate that 95% of batterers are men." Even Bonnie J. Campbell, Director of the Department of Justice's Violence Against Women Office, admits, "We are seeing numbers that suggest that young women are getting more aggressive." Carey Goldberg, *Spouse Abuse Crackdown, Surprisingly, Nets Many Women*, N.Y Times, Nov. 23, 1999, at A1, A14. (http://www.nytimes.com/yr/mo/day/news/national/ domestic-abuse.html).

Statistics from the Department of Justice Office of Juvenile Justice and Delinquency Prevention show that between 1981 and 1997, violent crime by girls increased

107%, compared to a 27% increase for boys. Terry Carter, *Equality With a Vengeance*, ABA Journal, Nov. 1999, at 22. Gang activity by girls also has become a notable problem. *See* Chicago Crime Commission, *The Girls Behind the Boys: Girls in Gangs* (1999). These facts belie the underlying premise of VAWA, that women as a group are subject to oppression by men as a group. The truth is far more complex.

Although violence against women has declined since 1976, "female-to-male violence showed no decline and was actually higher and about as severe as male-to-female violence." Richard J. Gelles, *The Missing Persons of Domestic Violence: Battered Men*, The Women's Quarterly, Autumn 1999, at 18, 20.

Professor Gelles emphasizes therein that women, usually smaller and weaker than men, are more likely to be injured as a result of partner violence, but that rates of assault are about equal for men and women.

Statistics are a particularly treacherous basis for constitutional reasoning particularly when the need for federal action is premised on a failure to act in accordance with the policy preferences of a certain intellectual faction of the population. A rule permitting Congress to "regulate commerce" by taking over traditional state functions based on transient views of the meaning of sociological data would simply not be principled Commerce Clause jurisprudence nor would it comport with *Lopez*. Furthermore, much of what Plaintiffs present as factual legislative history is demonstratively specious.

The four Senate Judiciary Committee hearings in 1990 and 1991 presented only witnesses who supported the bill. Cathy Young, *The Sexist Violence Against Women Act*,

Wall St. J., Mar. 23, 1994, at A15. Ms. Young reported that when a men's rights proponent asked to testify about gender bias in the bill (it originally literally granted rights only to women and not men), he was told to submit a statement for the written record. "He did so; when the record appeared, his statement was not included." *Id.*

Those who testified in favor of VAWA generally represented the very groups and interests that stood to gain from the five-year, $1.6 billion federal spending authorization under VAWA. Many such organizations and agencies, including the States, have filed briefs amici curiae in support of Plaintiffs.

Most of the "evidence" in the legislative history supporting VAWA is not factual data, but advocacy research consisting of the selective use of anecdotes and rhetoric to support a predetermined political result. Philosophy professor Christina Hoff Sommers devoted two chapters of her 1994 book *Who Stole Feminism?* to an exposé of the "noble lies" told by gender feminists to support their claims that the "patriarchy" uses systematic violence to oppress women as a class. Christina Hoff Sommers, *Who Stole Feminism?* 188-226 (1994).

Professor Sommers also dissected a media hoax that took the country by storm at the start of the 103d Congress (which eventually passed the then-pending VAWA bill). Days before Super Bowl Sunday in 1993, a coalition of women's groups called a press conference at which they claimed that a study by Old Dominion University had found a 40% increase in police reports of beatings and hospital admissions in Northern Virginia after football games won by the Washington Redskins during the 1988-89 season. *Id.* at 189. Journalists and commentators all over the country spread the alarm, including interviews of domestic violence

specialists who surmised, for example, that "provocatively dressed cheerleaders at the game may reinforce abusers' perceptions that women are intended to serve men." *Id.* at 190. Washington Post reporter Ken Ringle checked the sources, however, and found that the researchers whose work was cited denied having made any such findings or statements. Professor Sommers summarized the incident this way, *id.* at 15:

> No study shows that Super Bowl Sunday is in any way different from other days in the amount of domestic violence. Though Ringle exposed the rumor, it had done its work: millions of American women who heard about it are completely unaware that it is not true. *Id.* at 15.

Most of the supposed "facts" relied on by Congress in enacting VAWA and reiterated in briefs by Plaintiffs and their amici are, like the Super Bowl hoax, not true. Richard J. Gelles, Ph.D., a professor in the Child Welfare and Family Violence Department of the University of Pennsylvania School of Social Work, is one of the nation's foremost experts on this subject. He is the author or co-author of scores of publications, including (with Murray A. Straus) *Intimate Violence* (1988) and *Physical Violence in American Families: Risk Factors and Adaptations to Violence in 8,145 Families* (1995).

Professor Gelles has analyzed the content and sources of several common statements about domestic violence and found them to be unsupported, misleading or outright false.[2]

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[2] Professor Gelles has given permission to the Independent Women's Forum, among others, to reprint his memorandum, "Domestic Violence Factoids," which is reproduced in Appendix A.

Many of the same distortions appeared in the legislative history of VAWA and now reappear in the briefs of Plaintiffs and their amici, as though continued reliance on false statistics and nonexistent studies could somehow gives VAWA constitutional credibility, *e.g.*, United States Brief at 23-30; Brief Amici Curiae of National Network to End Domestic Violence, *et al.*, at 4-8, 16-22; Brief Amici Curiae of Lawyers' Committee for Civil Rights Under Law, *et al.*, 6-13; Brief Amicus Curiae of Senator Joseph R. Biden, Jr., *passim*.

Plaintiffs and their amici also cite congressional findings based on various state "Gender Bias Task Forces" dating from the mid-1980s to the early 1990s. The brief amici curiae of 35 state Attorneys General and Puerto Rico details the results of these state task forces, which generally found state efforts "inadequate." Brief Amici Curiae of the States of Arizona, *et al.*, 15-20. In fact, however, it has to be admitted that the states have not been inactive in this field. "States' longstanding efforts to address pervasive gender-based violence . . . have included significant legislative changes in domestic violence and sexual assault statutes." *Id.* at 20. Thus, when they conclude that those efforts "have thus far fallen far short of eliminating a widespread problem," they are making an assumption that more of the same at the federal level is needed. *Id.* No support is offered for the implicit assumption that federal efforts would be more effective.

Ideological distortions have produced a law that is not only unconstitutional, but harmful to the victims it purports to help. As Prof. Sommers notes, "Battered women don't need untruths to make their case before a fair-minded public that hates and despises bullies; there is enough tragic truth to go around." Christina Hoff Sommers, *Who Stole Feminism?*, at 17.

Unfortunately, VAWA was based on advocates' rhetoric, rather than honest scientific research. As a result, many VAWA programs are counterproductive (such as the mandatory arrest policies discussed above)[3] and even dangerous. VAWA uses the promise of federal grants to encourage treatment of offenders, but standardized programs are unsuitable for effectively treating the myriad of individual problems that are associated with intimate violence. Thus, according to some experts, "the man comes out of a useless mandated treatment program no less violent than when he went in, but with a clean bill of health." Sally L. Satel, M.D., *It's Always His Fault*, The Women's Quarterly, Summer 1997, at 4, 7 (quoting Prof. Richard M. McFall, Indiana University).

Dr. Satel, a practicing psychiatrist, reviewed numerous VAWA programs and concluded:

> [T]he battered women's movement has outlived its useful beginnings, which [were] to help women leave violent relationships and persuade the legal system to take domestic abuse seriously. Now they have brought us to a point at which a single complaint touches off an irreversible cascade of useless and often destructive legal and therapeutic events. This could well have a chilling effect upon victims of real violence, who may be reluctant to file police reports or to seek help if it subjects them to further battery from the authorities.

Id. at 10.

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[3] *See supra* p.14.

Of course, there already exist federal causes of action that protect citizens against deprivation of federal civil rights, including the Equal Protection Clause's guarantee against governmental discrimination based on sex. If there really were demonstrable state bias in state criminal justice systems in the sense of intentional discrimination, an equal protection remedy would already exist. There is no need to dishevel the Constitution to provide that protection. Besides, the civil remedy provision of VAWA has a peculiar disconnect with the claimed "legislative history" of state bias and failure - its rule barring removal to federal court, 28 U.S.C. § 1445(d). It is odd, in light of the purported justification for the Act, that Congress would confine these cases to the same state court systems whose "invidious discrimination" against women supposedly justified enactment of VAWA in the first place. *See* 42 U.S.C. § 13981(e)(3).

Brzonkala's contention that 42 U.S.C. § 13981 is constitutional under the Necessary and Proper Clause, not argued below, adds nothing of substance to the debate. If VAWA falls beyond the outer limit of the Commerce Clause, then passage of VAWA was not a "necessary or proper" exercise of commerce power. *Printz v. United States*, 521 U.S. 898, 923-24 (1997).

The theory that any perceived evil, no matter how much a traditional concern of state or local government, demands sweeping federal intervention and regulation displays a lack of patience with democratic processes. States in the exercise of their own public policy may wish to address the problems with distinct solutions tailored to local or statewide concerns. That such responses may vary is not evidence of the failure of our system of government but of its

success, proving that the grand constitutional structure protecting our liberties is working.

> The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked. There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit constitutional standards may be avoided . . . by the Congress . . . . With all of the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted constraints spelled out in the Constitution.

I.N.S. v. Chadha, 462 U.S. 919, 959 (1983) (citations omitted).

2. Congress Has No Power Under the Fourteenth Amendment To Regulate Purely Private Action.

Plaintiffs and their amici ask this Court to adopt an extreme anti-federalistic rule that § 5 of the Fourteenth Amendment grants Congress broad power to regulate purely private conduct upon a congressional finding that State inaction has resulted in statistical inequality. This plea for a sweeping federal power is foreclosed by history and

precedent. More than a century ago, Congress passed a statute that by its terms sought to provide a remedy against private persons for deprivations of federal civil rights, now codified as 42 U.S.C. § 1985(3). This Court's treatment of 42 U.S.C. § 1985(3) in *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), and *United Brotherhood of Carpenters & Joiners of Am., Local 610 v. Scott*, 463 U.S. 825, 828-29 (1983), is as instructive on the question of Congressional authority as it is destructive to Plaintiffs' case. The relevance of that statute is also heightened because Congress cited it as a precedent for VAWA. S. Rep. No. 103-138, at 64 (1993).

Despite Congress' assertion to the contrary, § 1985(3), as interpreted by this Court, does not support sweeping assumptions of omnicompetence that underlie VAWA. Section 1985(3) was originally enacted as § 2 of the Civil Rights Act of 1871. In *United States v. Harris*, 106 U.S. 629, 637-40 (1883), the criminal provision of the Act was held unconstitutional as exceeding the boundaries of Congress' power under § 5 of the Fourteenth Amendment. *Brzonkala*, 169 F.3d at 865. For many years, the analogous civil provision, 42 U.S.C. § 1985(3), was construed as reaching only conspiracies under color of state law. *Collins v. Hardyman*, 341 U.S. 651 (1951). Then in *Griffin v. Breckenridge*, 403 U.S. 88, 95-96 (1971), this Court held that, at least as to certain limited facts, the statute could reach private action violating the guarantees of the Thirteenth Amendment, an amendment not requiring state action. It was this distinctly limited right of action against purely private deprivations of federal rights that this Court explained in *Bray*.

Bray v. Alexandria Women's Health Clinic involved a § 1985(3) claim against antiabortion groups allegedly obstructing and interfering with women seeking abortions.

Section 1985(3) requires the plaintiff to allege and prove four elements: (1) a conspiracy (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws, and (3) an act in furtherance of the conspiracy, (4) whereby a person is either injured in his property or deprived of any right or privilege of a citizen of the United States. *United Brotherhood of Carpenters*, 463 U.S. at 828-29. The district court granted an injunction against the challenged activity and the Fourth Circuit affirmed. *National Org. for Women v. Operation Rescue*, 914 F.2d 582 (4th Cir. 1990), *rev'd in part, vacated in part sub nom. Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993). This Court reversed, holding that plaintiff showed neither the required animus nor any interference with federal rights protected against encroachment by private persons. *Bray*, 506 U.S. at 268.

This Court held that to reach private actors, the right infringed must be one protected not only against governmental, but also against private, interference. *Bray*, 506 U.S. at 275. The range of such rights is exceedingly narrow. *Id.* at 278. This Court has recognized two – the Thirteenth Amendment right to be free from involuntary servitude, *United States v. Kozminski*, 487 U.S. 931 (1988), and, in the same Thirteenth Amendment context, the right to interstate travel, *United States v. Guest*, 383 U.S. 745, 759 n.17 (1966). *Id.* It has rejected a claim that an alleged private conspiracy to infringe First Amendment rights violated § 1985(3), holding that the statute cannot not apply to a right protected only against state interference, but only to one also protected against private interference. *Id.* (citing *United Brotherhood of Carpenters*). As the *Bray* Court said:

> There are few such rights. The right to abortion is not among them. It would be most

> peculiar to accord it that preferred position, since it is much less explicitly protected by the Constitution, than, for example, the right of free speech rejected for such status in *Carpenters*. Moreover, the right to abortion has been described in our opinions as one element of a more general right of privacy, or of Fourteenth Amendment liberty, and the other elements of those more general rights are obviously not protected against private infringement. (A burglar does not violate the Fourth Amendment, for example, nor does a mugger violate the Fourteenth).

Id.

Thus, *Bray* makes it clear that Congress' power to reach and regulate private tortious action is extremely narrow, and in doing so, *Bray* built on a consistent line of cases limiting the federal power to regulate private conduct. As this Court stated in *United Brotherhood of Carpenters*:

> Had § 1985(3) in so many words prohibited conspiracies to deprive any person of the Equal Protection of the laws guaranteed by the Fourteenth Amendment or of Freedom of Speech guaranteed by the First Amendment, it would be untenable to contend that either of those provisions could be violated by a conspiracy that did not somehow involve or affect a state. 'It is commonplace that rights under the Equal Protection Clause itself arise only where there has been involvement of the State or of one acting under color of authority. The Equal Protection Clause "does not . . . add any thing to the rights which one citizen has under the Constitution against another."

> As Mr. Justice Douglas more recently put it, "The Fourteenth Amendment protects the individual against state action, not against wrongs done by individuals." This has been the view of the Court from the beginning. It remains the Court's view today.' *United States v. Guest*, 383 U.S. 745, 755 (1966).

463 U.S. at 831-32 (citations partially omitted).

This Court's construction of *United States v. Guest* in both *Bray* and *United Brotherhood of Carpenters* refutes various attempts to bootstrap concurrences in *Guest* into a contrary principle. *See* United States Brief at 47 n.28. One federal court has already explicitly stated that the argument that the concurrences in *Guest* stand for a Congressional power under the Fourteenth Amendment to enact laws punishing conspiracies regardless of state action is unsound, observing that "[w]hile what could loosely be termed a 'majority' expressed such a view, the matter is only one of academic interest since the opinion of the Court stated the exact opposite." *United States v. Wilson*, 880 F. Supp. 621, 635 (E.D. Wis.), *rev'd on other grounds*, 73 F.3d 675 (7th Cir. 1995). The *United Brotherhood of Carpenters* Court explicitly held that the Fourteenth Amendment *does not* provide authority to proscribe exclusively private conspiracies generally. 463 U.S. at 862-63.

Moreover, *Griffin* does not create a broad federal right to regulate private conduct. *See* Brzonkala Brief at 46; Brief Amicus Curiae of Senator Joseph R. Biden, Jr., at 17. In *Griffin*, this Court limited its holding by observing that it need not find the language of the governing statute constitutional in all its possible applications in order to uphold its facial constitutionality as applied to the particular complaint. *Griffin*, 403 U.S. at 104. That decision also

relied on Congressional power under the Thirteenth Amendment and the constitutionally protected right to travel, which do not rest on Fourteenth Amendment grounds. *Id.* at 104-06. Moreover, the *Griffin* Court held that an attempt to construe the statute as a general federal tort law would be unconstitutional. *Id.* at 101-02. In *United Brotherhood of Carpenters*, the Court stated that *Griffin* did not hold that when the alleged conspiracy is aimed at a right protected only against state interference (such as the equal protection violations alleged here), a § 1985(3) plaintiff need not prove state involvement. 463 U.S. at 862.

Bray also is fatal to attempts by Plaintiffs to string together general statements or dicta to argue that Congress' enforcement power "may at times also include the power to define situations which Congress determines threaten the principles of equality and to adopt prophylactic rules to deal with those situations." United States Brief at 37 (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490 (1989) (O'Connor, J., concurring)). As Justice O'Connor stated in *Bray*, the Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful." *Bray*, 506 U.S. at 354 (O'Connor, J., dissenting).

Brzonkala attempts to avoid the obvious result dictated by this jurisprudence by concluding that VAWA grants a substantive right "premised on substantive findings of equal protection violations by state actors" to be free of violent crime motivated by gender-based animus. Brzonkala Brief at 48. But this argument begs the question of the source of Congressional power to create a general right to freedom from tortious acts of private individuals. *See Brzonkala*, 169 F.3d at 852. Just as the Court rejected the Equal Protection Clause of the Fourteenth Amendment as a valid source of power to regulate private conduct in *United Brotherhood of Carpenters*, so too has it rejected any right to

be free of violent crimes stemming from the Amendment's Due Process Clause:

> Nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of minimal level of safety and security . . . . [I]ts language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means . . . . Its purpose was to protect the people from the State, not to ensure that the State protected them from each other.

DeShaney v. Winnebago County Dept. of Soc. Servs., 489 U.S. 189, 195-96 (1989). Thus, there is no Fourteenth Amendment right to protection against the tortious conduct of others.

If Congress actually enjoyed the expansive power under § 5 of the Fourteenth Amendment that Plaintiffs and their amici claim, it would be difficult to account for an entire body of Fourteenth Amendment jurisprudence from this Court determining when private conduct becomes sufficiently involved with governmental action to invoke the Amendment. Nor can a case frequently cited by Plaintiffs and their amici, *Heart of Atlanta Motel*, be reconciled with their theory, since the Court there used the Commerce Clause to uphold the constitutionality of Title II of the Civil Rights Act of 1964, rejecting, at least by implication, Justice Douglas' opinion that Congress' § 5 power was sufficient. *See Heart of Atlanta Motel*, 379 U.S. at 281.

Clearly, Plaintiffs' theory defies any historical understanding of state action analysis. *See Brzonkala*, 169 F.3d at 885. It also ignores the second part of the test set forth in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982), that the challenged action be undertaken by one who may be fairly said to be a state actor – a state official or one who obtained significant aid from the State or whose acts are otherwise chargeable to the State. The police, prosecutors, judges and court personnel of this nation would no doubt be surprised to learn that their efforts, unappreciated as though they might be, are not *deterring* but instead *causing* a class of criminals to deprive victims of crimes of violence of their civil rights. Such arguments, however earnestly made, are constitutionally fanciful and provide no justification for Plaintiffs' flawed public policy goals of overturning federalism and creating the "potential for Orwellian mischief." *Arizona v. Evans*, 514 U.S. 1, 25 (1995) (Ginsburg, J., dissenting).

CONCLUSION

Plaintiffs and their amici argue for upholding the constitutionality of the civil remedy provision of the Violence Against Women Act, 42 U.S.C. § 13981, on grounds that threaten the constitutional rights of all citizens. If Congress had the authority to regulate all activities that have a discernable effect on commerce, however remote or indirect it might be, then there would be no area of life exempt from federal regulation. The well-established state action requirement of the Fourteenth Amendment exists to limit government encroachments. Those urging the constitutionality of VAWA are slighting longstanding and well-settled conceptions of the value of federalism to the preservation of our liberty. As amicus curiae, the Independent Women's Forum respectfully asks this Court to affirm the decision of the United States Court of Appeals for the Fourth Circuit.

Respectfully Submitted,

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APPENDIX A

DOMESTIC VIOLENCE FACTOIDS

by Richard J. Gelles

* ACCORDING TO THE FBI, A WOMAN IS BEATEN EVERY [ ] SECONDS:

First, the FBI does not calculate, tabulate, or track data on domestic violence. The FBI once did estimate that a women is beaten every 15 seconds, but they derived this estimate from Murray Straus, Richard J. Gelles, and Suzanne K. Steinmetz's book, Behind Closed Doors: Violence in the American Family.

Various other fact sheets list various other number of seconds. The number of seconds depends on the study (if there actually was one) and how violence was defined. For example, some versions of this factoid state that a woman is beaten every 9 seconds and cite a study done by the Commonwealth Fund in July, 1993. The Commonwealth Fund study used the same measure as was used by Straus and his colleagues. Unlike Straus and his colleagues who defined "abuse" as acts of violence that were likely to cause and injury, the Commonwealth Fund defined "abuse" as every thing from pushing, shoving and slapping to using a gun or knife.

* THERE ARE FOUR MILLION WOMEN BEATEN AND ABUSED EACH YEAR.

Same problems as above. The Straus, Gelles, and Steinmetz survey estimated that 2 million women were abused each year by their husbands. Straus and his colleagues speculated that if all the respondents told the truth and if ex-husbands and boyfriends were included, the number could be as high as 4 million. However, no study to

date using a representative sample and measuring severe violence, has found more than 2 million abused women each year.

* DOMESTIC VIOLENCE IS THE LEADING CAUSE OF INJURY TO WOMEN BETWEEN THE AGES OF 15 AND 44 IN THE UNITED STATES--MORE THAN CAR ACCIDENTS, MUGGINGS, AND RAPES COMBINED.

This factoid has been attributed to both Surgeon General Antonia Novello and the Centers for Disease Control. The actual primary source of this "fact" is research by Evan Stark and Ann Flitcraft. It was probably Stark and Flitcraft who supplied the fact to CDC, who then included it in material supplied to the Surgeon General. Unfortunately, as good a sound bite as this is, it is simply not true. The original source of this statement goes back to two papers by Stark and Flitcraft. First, the actual research the "fact" is based on is a rather small survey of one emergency room. Second, in the original articles, they said that domestic violence may (emphasis added) be a more common cause of emergency room visits that car accidents, muggings, and rapes combined.

Linda Saltzman from the Centers for Disease Control tells all journalists who call to check this fact that the CDC does not recognize this as either their fact or a reputable fact.

* THE MARCH OF DIMES REPORTS THAT BATTERING DURING PREGNANCY IS THE LEADING CAUSE OF BIRTH DEFECTS AND INFANT MORTALITY.

The March of Dimes actually reports that they know of no such study.

* SIXTY THREE PERCENT OF YOUNG MEN BETWEEN THE AGES OF 11 AND 20 WHO ARE SERVING TIME FOR HOMICIDE HAVE KILLED THEIR MOTHER'S ABUSER.

This factoid is often used by Sarah Buel in her speeches. It appears to be yet another fact from nowhere. The FBI has published no data that supports this claim. The FBI's Uniform Crime Reports has no tables that report on prison populations, let alone a table or figure that breaks down prison populations by age of offender and relationship to victim. There are no Department of Justice reports that report on what number or percentage of young men kill their mother's batterer.

* FAMILY VIOLENCE HAS KILLED MORE WOMEN IN THE LAST FIVE YEARS AS THE TOTAL NUMBER OF AMERICANS WHO WERE KILLED IN THE VIETNAM WAR.

This factoid was often used by Dr. Robert McAfee, past president of the American Medical Association. There were about 55,000 American casualties in the Viet Nam War. According to the FBI, Uniform Crime Statistics, about 1,500 women are killed by their husbands or boyfriends each year. The total number of women homicide victims each year is about 5,000. Thus, in five years, even if every woman who was killed, was killed by a family member, the total would still be 1/2 the number of American casualties in Viet Nam.

* WOMEN WHO LEAVE THEIR BATTERERS ARE AT A 75% GREATER RISK OF BEING KILLED BY THE BATTERER THAN THOSE WHO STAY.

Women are more likely to be victims of homicide when they are estranged from their husbands than when they live with their husbands -- BUT NOT A 75% GREATER RISK. The risk of homicide is higher in the first two months after separation.

SOURCE: Wilson, Margo and Martin Daly, "Spousal homicide risk and estrangement." Violence and Victims 8, 3-16.

* WOMEN WHO KILL THEIR BATTERERS RECEIVE LONGER PRISON SENTENCES THAN MEN WHO KILL THEIR PARTNERS.

This factoid is often attributed to someone from Pace University. There is no actual published source for this. According to the Bureau of Justice Statistics, Violence Between Intimates (November, 1994), the average prison sentence for men who killed their wives was 17.5 years; the average sentence for women convicted of killing their husbands was 6.2 years.

FACTOIDS FROM THE RIGHT OF CENTER

* WOMEN ARE AS VIOLENT AS ARE MEN, AND WOMEN INITIATE VIOLENCE AS OFTEN AS DO MEN.

This factoid cites research by Murray Straus, Suzanne Steinmetz, and Richard Gelles, as well as a host of other self-report surveys. Those using this factoid tend to conveniently leave out the fact that Straus and his colleague's surveys as well as data collected from the National Crime Victimization Survey (Bureau of Justice Statistics) consistently find that no matter what the rate of violence or who initiates the violence, women are seven to ten times

more likely to be injured in acts of intimate violence than are men.

* OTHER FACTOIDS FROM NOWHERE

* 4,000 women each year are killed by their husbands, ex-husbands, or boyfriends.

The FBI reports that approximately 1,500 women are killed each year by husbands or boyfriends. Even if one factors in the number of women killed by unidentified or undetermined assailants, the number could not be 4,000.

* Women of all cultures, races, occupations, income levels, and ages are battered -- by husbands, boyfriends, lovers and partners.

While this fact is technically true, it is also true that domestic violence is more likely to occur in homes below the poverty line, in minority households (even controlling for income), and among men and women 18 to 30 years of age.

* Nationally, 50 percent of all homeless women and children are on the streets because of violence in the home.

An interesting factoid stated by Senator Biden, but one without any actual published scientific research to support it.

* There are nearly three times as many animal shelters in the United States as there are shelters for battered women and their children.

Another great sound bite, but one not actually based on a verified count of either type of shelter.

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Nos. 99-5 and 99-29

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

UNITED STATES OF AMERICA,
Petitioner,
– v. –
ANTONIO J. MORRISON, ET AL.,
Respondents.

CHRISTY BRZONKALA,
Petitioner,
– v. –
ANTONIO J. MORRISON, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF AMICUS CURIAE OF WOMEN'S FREEDOM NETWORK ON BEHALF OF RESPONDENTS

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INTEREST OF AMICUS

The Women's Freedom Network is an organization dedicated to promoting equal rights and fairness for both sexes using an individual-rights oriented approach to gender issues.

SUMMARY OF ARGUMENT

The Court should hold that violent criminal acts cannot be presumed to fall within the purview of the Commerce Clause. U.S. Const. art. I, § 8. The Court should decide this constitutional question without deference to Congress's opinions expressed in its findings.

As *Lopez* provided, the Court must make an "independent evaluation of constitutionality." *U.S. v. Lopez*, 514 U.S. 549, 562 (1995). When a constitutional question concerns the scope of the Commerce Clause and not the rationality of a Congressional classification, the Court has an obligation to review it independently. Even the cases cited by Petitioners – *Preseult v. I.C.C.*, 494 U.S. 1 (1990), *Katzenbach v. McClung*, 379 U.S. 294 (1964) and *Heart of Atlanta Motel, Inc. v. U.S.*, 379 U.S. 241 (1964) – clearly demonstrate this point. Indeed, the Petitioners' argument is an attack on two key structures of our system of government: separation of powers and judicial review. *City of Boerne v. Flores*, 521 U.S. 507 (1997), affirmed that the Court must defend itself against such attacks. The Court's responsibility to safeguard the system of federalism, by enforcing Tenth Amendment limitations, provides yet another reason why the Court should make its constitutional decision about the scope of the commerce power without being bound by any opinion of Congress that is merely "rational."

Congress's finding that gender-motivated violence substantially affects interstate commerce is conclusory and is not supported by any evidence whatsoever. The statistics Congress considered, concerning general instances of violence affecting women, such as rape and domestic violence, do not speak to the incidence of gender-motivated violence. Nor do they demonstrate that women are disproportionately affected by crimes of violence. And they certainly do not show any significant effect upon interstate commerce. The Court should therefore hold that the Congress's finding is without a rational basis, and

should not rely upon this finding in making its own decision regarding the scope of the commerce power.

In any case, the Court should hold that the Congress's legislative decision to target gender-motivated violence was irrational. Gender-motivated violence is not the cause of any effects upon interstate commerce found by the Congress to result from violence generally. Therefore, § 13981 (the "provision") is not reasonably crafted to target an activity that is causally related to the effect found. Indeed, it is both underinclusive (in failing to target the activity about which findings were made), and overbroad (in presuming that all types of gender-motivated violence substantially affect interstate commerce).

Furthermore, the Court must hold § 13981 invalid as exceeding the scope of the commerce power. The Court must do so, because gender-motivated violence's relationship to interstate commerce is too remote to be "substantial" as a constitutional matter. That most of the claimed effects stem from the *fear of* gender-motivated violence adds an additional step to an already arduous journey, further showing how remote is the connection to interstate commerce. In any case, Petitioners' two proffered connections (the decrease in national productivity, and the costs of the criminal acts) were squarely rejected in *Lopez* because they did not contain a limiting principle, yet none of the limiting principles suggested by Petitioners provide effective limits.

The Court should also hold that § 13981 exceeds the reach of the commerce power because it targets a non-economic activity. Sweeping dicta in past cases notwithstanding, the Court has never held that the Congress could enact a presumption that the commerce power extended over violent criminal acts, and it should not do so now.

Finally, the Fourteenth Amendment also does not permit Congress's *ultra vires* action. Congress's power under this Amendment is remedial only, and there is no rational basis for Congress to find gender bias attributable to the States because there is no persuasive evidence of such bias.

ARGUMENT

Petitioners ask this Court to hold that all gender-motivated violence is within the reach of the commerce power. The Court's precedents demand that it refuse. Furthermore, the structure of § 13981 raises disturbing questions in its lack of regard for federalism, the separation of powers, and the Court's authority as the ultimate interpreter of the Constitution.

Section 13981 rests not only upon factually incorrect premises but also upon the offensive and false assumption that the nation is in the midst of a gender war. If read to include a presumption that all violent crimes against women are crimes due to gender, then the provision needlessly polarizes women and men, and offensively perpetuates outdated stereotypes portraying men as brutal aggressors and women as passive victims. If read to require a showing of gender animus in each case, then it poses the danger that trials will become repeated referenda on gender-group dynamics, thereby taking away attention from trials' proper focus: the crimes of individual offenders and the suffering of individual victims.

A comparison of § 13981 to the Civil Rights Act of 1964 is equally ill-conceived. To equate Jim Crow regimes with whatever subtle bias or societal trends may affect women today is to trivialize the serious hardships suffered by blacks in the past. Indeed, black and minority men may be disadvantaged by policies that protect women at the risk of injustice to men.[1] In this case, the alleged behavior of Respondents Morrison and Crawford, both young black men, was evaluated by both University judicial committee and a grand jury. The grand jury did not find enough evidence to proceed with the matter,

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[1] *See, e.g.*, Cathy Young, *Who Says Women Don't Lie About Rape*, Salon Magazine, Mar. 10, 1999, http:\\www.Salon.com\news\1999\03\cov_10news.html (The "'women don't lie' dogma has led to serious infringements on the rights of accused men [because] it seems to leave no room for the presumption of innocence when a woman accuses a man of violating her"); *see also* Jiordana Hart, *Lawsuit Says Men Face Bias In Courts,* Bost. Globe, Sept. 8, 1999, at B3 (lawsuit filed by Massachusetts men alleges gender bias by domestic relations courts in, for example, granting restraining orders without sufficient evidence to meet legal standard).

and the University found only that Morrison had used abusive language. *See* News Release, Office of the Commonwealth's Attorney for Montgomery County, April 10, 1996; Letter from Peggy Meszaros Senior V.P. and Provost of VA Tech, to Faculty, Staff, and Students of VA Tech, Dec. 5, 1995. Now Ms. Brzonkala has revived her complaint against Morrison and Crawford yet again, this time using § 13981. This factual scenario – in which a white woman is given the option to renew a twice-rejected complaint against young black men – should give pause to those Petitioners and amici who view the world through lenses of race and gender. The Women's Freedom Network itself believes that it is no more anti-female to recognize that some women wrongly accuse men of rape, than it is anti-male to recognize that some men rape women.

I. The Court Must Decide the Constitutional Questions Without Deference to Congress's Opinions.

A. As *Lopez* articulated, the Court must make an "independent evaluation of constitutionality" in deciding whether an activity substantially affects interstate commerce so as to fall within the reach of the commerce power.

Lopez clearly states that the Court must conduct an "*independent* evaluation of constitutionality under the Commerce Clause." *See Lopez*, 514 U.S. at 562 (emphasis added); *see also id.* at 557 n.2 (whether an activity 'substantially affects' interstate commerce such that it may be regulated under the Commerce Clause "is ultimately a judicial rather than a legislative question") (quoting *Heart of Atlanta*, 379 U.S. at 273 (Black, J., concurring).

This pronouncement of *Lopez*, the Court's most recent and important commerce case, is definitive. Indeed, knowing they cannot win an argument that review is not "independent," Petitioners argue that by performing an "independent" judgment the *Lopez* Court simply "ma[d]e its own judgment as to whether Congress had a rational basis." Brz. Br. at 27, *see also* Gov't at 22. This argument strangely fails to acknowledge the factual context in which the *Lopez* Court made its "independent" decision: Congress had recently amended the statute by appending findings to it. If the Court had truly believed that

the presence of findings changed an independent decision into a rational basis review, it never would have struck the provision because engaging in such proceduralism would have been disrespectful to Congress.

As the next section shows, Petitioners' argument depends upon the use of imprecise statements from cases decided during the most expansive period in the Court's commerce jurisprudence, and confuses the Court's two roles: determining the answers to constitutional questions, and reviewing Congress's answers to legislative questions.

B. Congress's findings on factual or legislative questions do not decide the constitutional questions presented here, nor do past cases suggest otherwise.

In deciding whether § 13981 exceeds the reach of the commerce power, this Court must answer at least one of the following two questions. The first is whether the *activity* regulated – violent criminal acts motivated by gender animus – is within the reach of the commerce power. The second is whether this activity affects interstate commerce *substantially* enough to fall within the commerce power. The Court must decide both questions without any deference to Congress's opinion, whether or not expressed in formal or informal findings, because the Court alone has the "power" to decisively and finally "determine if Congress has exceeded its authority under the Constitution." *City of Boerne v. Flores*, 521 U.S. at 536 (1997); *see Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 172 (1803).

This case also offers the Court the opportunity to review one factual finding of Congress (that there is a burden upon interstate commerce), and one legislative one (that regulation of the activities targeted will alleviate that burden). The Court may perform both of these reviews using the "rational basis" test.

In an argument evincing their fundamental misunderstanding of the Court's authority, Petitioners state, quoting *Preseult*, 494 U.S. at 17, that the presence of congressional findings must shift the Court's analysis of the purely constitutional questions into the same rational basis standard used to review legislative decisions. *See* Gov't at 22, Brz. Br. at 27 (quoting *Preseult*'s statement that "we must defer to a congressional finding that a regulated activity affects interstate

commerce if there is any rational basis for such a finding"). The development of the two different standards, however, is premised on the fact that the Court and the Congress have different areas of competence. *See City of Boerne*, 521 U.S. at 535 (Congress's "sphere of powers and responsibility" differs from Court's). Petitioners' attempt to delegate much of the Court's authority over constitutional questions to the Congress (which has primary legislative authority) should fail for this reason alone.

1. In *Preseult, McClung*, and *Heart of Atlanta*, the Court decided the constitutional questions without deference to Congressional findings; the language Petitioners quote refers only to the Court's deference to Congressional structuring of the statutory scheme.

A close reading of all three cases demonstrates that the Court decided the questions concerning the scope of the commerce power without deference to Congress's findings.

In reviewing whether the Congress could create a recreational trail system along interstate railway rights of way without triggering rights that arose upon abandonment of railway use, the *Preseult* Court did not face either of the constitutional questions raised here, because its power to regulate channels of interstate commerce was already well-established.

The only question at issue in *Preseult* was a legislative one: whether Congress had chosen acceptable means to accomplish a clearly constitutional purpose. Both the findings, and the Court's decision, related solely to the validity of the *means* chosen. Congress's findings were only that the means chosen would effect the law's desired purpose of rail banking, *see Preseult*, 494 U.S. at 8 ("The key finding of this Amendment is that interim use of a railroad right of way for trail use ... shall not constitute an abandonment of such rights-of-way for railway purposes"). The Court's holding also focused upon the rationality of the means, concluding that "we are not at liberty under the rational basis standard of review to hold the [law] invalid merely because more Draconian *measures* ... might advance more

completely the rail banking purpose." *Preseult*, 494 U.S. at 18-19 (emphasis added).[2]

Nor do *McClung* and *Heart of Atlanta* support Petitioners' view. In each case the Court employed rational basis review, in judging Congress's legislative decision that its chosen means were appropriate, only after it had first concluded that the legislative action was permitted by virtue of being within the commerce power.

To begin with *McLung*, the Court there had no need to analyze extensively whether the activity – the discriminatory service of food in interstate restaurants – was reached by the commerce power, because the "Court has held time and again that this [commerce] power extends to activities of retail establishments, including restaurants, which ... burden interstate commerce." *McLung*, 379 U.S. at 302. As to whether the activity's effect upon interstate commerce was substantial enough to make regulation of it constitutionally permissible, the Court performed an independent review of the information considered by Congress before holding that the effect was indeed substantial enough. The Court could not have felt bound to defer to Congress's informal findings, for it neither expressed any such belief nor chastised the district court for ignoring them. *See id.* at 300 (telling district court only that its conclusion"fl[ew] in the face of stubborn fact").

The Court's only remaining task was to review the legislative determination "whether the Act is a reasonable and appropriate means" to solve the burden imposed upon interstate commerce by discrimination in food service. *Id.* at 299. The "means" questioned was, of course, the Congress's choice to prohibit *racial discrimination* in restaurants. The Court concluded that the choice to target this particular activity was an acceptable one: "where the legislators ... have a rational basis for finding a *chosen regulatory scheme* necessary for the protection of commerce, our investigation is at an end." *Id.* at 303-04. The Court then summarized as follows:

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[2] Petitioners in that case also argued that the Congress's true purpose was the creation of the trails rather than the "rail banking." Knowing that this activity also had previously been determined to be within the commerce power, the Court dismissed Petitioners' argument by stating the trails were valid "because they are *reasonably adapted* to the goal."

1) "Congress ... had a rational basis for finding that *racial discrimination* in restaurants" negatively affected interstate commerce, and 2) Congress "prohibited discrimination only in those establishments having a close tie to interstate commerce ... We think that in so doing, Congress acted well within its power." *Id.* at 303-304 (emphasis added). Clearly, the Court applied the rational basis test only to the choice of the targeted activity, and decided the constitutional question on its own.

Petitioners' other case, *Heart of Atlanta*, provides even less support for their argument that the Court should employ the rational basis test no matter whether it is reviewing a legislative decision or answering a constitutional question. In *Heart of Atlanta* also, the Court did not defer to the informal Congressional findings, but instead examined them and then -- reaching its own constitutional conclusion about the substantiality of the effect -- stated that "the voluminous testimony presents overwhelming evidence that discrimination by hotels and restaurants impedes interstate travel." *Heart of Atlanta*, 379 U.S. at 241. The Court then easily disposed of the other constitutional question (whether the activity was one that could be regulated), concluding that the regulation of *hotels* was well within the Congress's power to safeguard "channels of interstate commerce" and "local incidents thereof". *See id.* at 256, 258.[3]

Only after it turned to address the Fifth Amendment challenge did the Court review Congress's legislative determination regarding the scope and structure of the Act, and it was in this context *only* that the Court framed the questions as "(1) whether Congress had a rational basis for finding that racial discrimination by motels affected commerce, and (2) if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate." *Id.* at 258.

All the commerce cases can be parsed in this manner. Such an exercise leads to an inescapable conclusion: the Court employs rational basis review only when reviewing the classifications and

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[3] The Court also found it important that the Civil Rights Act of 1964, unlike the Civil Rights Act of 1875, included a requirement that affected hotels and restaurants have a relationship to interstate commerce. *See Heart of Atlanta*, 379 U.S. at 250. Of course, § 13981 includes no such requirement.

choices Congress makes in structuring laws, and not when deciding whether a law is empowered by an enumerated power.

2. Concern for the separation of powers and the system of judicial review also compels the conclusion that the Court cannot defer to Congress in deciding constitutional questions relating to the scope of federal power.

No doubt is cast upon this conclusion by the Court's review of State laws affecting commerce under a rational basis standard. Because state power is plenary, the Court in reviewing state actions is never concerned with whether a targeted activity falls within the scope of state power. Rather, the Court reviews state laws only for their compliance with constitutional guarantees such as the right to "equal protection of the laws." U.S. Const. amend. XIV. In such reviews, the Court merely examines the classifications made by the States in executing power that is clearly within their scope, and therefore properly uses the rational basis test.

Similarly, although the Court uses the "rational basis text" to review most Congressional actions under the Fifth Amendment's guarantee of equal protection, this is because that clause speaks only to the manner in which the federal government may act, and does not purport to define the scope of such action.

In contrast, although Congress's power to regulate "commerce ... among the several States" is plenary, it is nonetheless bounded, because it is an enumerated power. The plenary power over *means* is available, therefore, only once the Court has determined independently that the targeted activity is within the scope of the commerce power.

The Court refused in *City of Boerne* to let Congress define the scope of its powers under the Fourteenth Amendment, because "[i]f Congress could define its own powers ... no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means'.... Under this approach, it is difficult to conceive of a principle that would limit congressional power." *City of Boerne*, 521 U.S. at 529. The same principle applies here. The Court should refuse to let Congress define the scope of its powers under the Commerce Clause:

the Court must address the two constitutional questions without deference to the Congress.

C. The Court's responsibility to enforce other constitutional limitations confirms that it must independently answer questions about the scope of constitutional power.

The "independent" review applied in *Lopez* is vitally necessary to safeguard the system of federalism against an expansionist national government. Of course, the Court has stated consistently from the outset that the power of Congress over interstate commerce "acknowledges" the "limitations ... prescribed by the constitution." *Gibbons v. Ogden*, 9 Wheat 1, 196 (1824); *see also Wickard v. Filburn*, 317 U.S. 111, 124 (1942) ("The power of Congress over commerce ... acknowledges no limitations other than are prescribed in the Constitution") (quoting *U.S. v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942) (quoting *Gibbons*); *NLRB v. Jones & Laughlin Steel*, 301 U.S. 1, 57 (1937) (scope of the commerce power "must be considered in the light of our dual system of government").

It is becoming ever clearer, however, that these limitations are real, and that in exercising any power granted it by the constitution, the federal government must still observe other constitutional limitations. In particular, actions justified under the Commerce Clause often implicate "the proper division of authority between the Federal Government and the States." *New York v. U.S.*, 505 U.S. 144, 144 (1992). Whenever the Court must identify the outer limits of the commerce power, therefore, it must also keep federalism concerns in mind. As Justice O'Connor, writing for the Court in *New York v. U.S.*, explained:

> "In some cases the Court has inquired whether an Act of Congress is authorized by one of the powers delegated to Congress ... [i]n other cases the Court has sought to determine whether an Act of Congress invades the province of State sovereignty ... [T]he two inquiries are mirror images of each other. ... In the end, it makes no difference whether one views the question at issue in these cases as one of ascertaining the limits of the power delegated to the Federal Government under the affirmative provisions of the Constitution or one of discerning the core of sovereignty retained by the States under the Tenth Amendment. Either way, *we* must determine whether any of [the challenged provisions] overstep the boundary between federal and state authority."

Id., 505 U.S. at 155, 159 (emphasis added).

The Court must certainly consider federalism in this case, for two reasons. First, the challenged provision affects an area of the law "to which the States lay claim by right of history and expertise." *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring); *see also Brzonkala v. Virginia Polytechnic Institute and State University*, 169 F.3d 820, 840-842 (4th Cir. 1999) (describing multiple ways in which the challenged statute alters the balance between federal and state power). Second, the provision attempts an "extension" of the commerce power beyond that which is well established. *See Lopez*, 514 U.S. at 580 (Kennedy, J., concurring) (when "Congress attempts [an] extension [beyond the commerce power upheld in "earlier cases to come before the Court"], then at the least we must inquire whether the exercise of national power seeks to intrude upon an area of traditional state concern").

Whenever the federal-state line is implicated by a statute, a court considering the statute must perform its constitutionally-allocated responsibility to say where the line is. As Justice Kennedy explained in *Lopez*:

> Although one conclusion that *could be* drawn from the Federalist Papers is that the balance between national and state power is entrusted in its entirety to the political process, ... the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far.

Lopez, 514 U.S. at 575 (Kennedy, J., concurring).

Just as clearly, the Court's consideration of Tenth Amendment limitations upon the commerce power must be "independent," i.e., not

bound even by rational congressional opinions on the question.[4] Any more deferential standard of review would be "nothing short of putting the fox in charge of the chicken coop," as the Fourth Circuit put it, *Brzonkala*, 169 F.3d at 861, because the chief threat to state sovereignty is the Congress itself. Furthermore, use of a "rational basis" standard would be an improper abdication of the Court's responsibility, because in the "difficult" and delicate federalism inquiry, both sides will undoubtedly have strong and reasonable arguments to draw upon. *See Lopez*, 514 U.S. at 565-66 (although dissent argues that "Congress could just as easily look at child rearing as 'fall[ing] on the commercial side of the line,'" Congress's broad authority "does not include the authority to regulate each and every aspect of local schools"). The Court here can fulfill its role only by deciding *for itself* whether a statute "upsets the federal balance to a degree that renders it an unconstitutional assertion of the commerce power." *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring).

D. The Court must also independently decide whether the Fourteenth Amendment remedy is "congruent" and "proportionate".

In deciding whether a remedy chosen by Congress falls within the power granted it by the Fourteenth Amendment (*i.e.*, in applying the test whether the remedy is congruent and proportional), the Court must conduct an independent review. *See City of Boerne v. Flores*, 521 U.S. 507.

II. Congress's Findings Fail a Rational Basis Test, and Therefore Cannot Support the Constitutional Conclusions of Either the Congress or the Court.

A. In making its independent constitutional decision about the scope of the commerce power, the Court should not rely upon Congressional factual findings that are both inaccurate and irrelevant.

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[4] The Court's obligation to make an independent review is made easier by its ability to rely upon precedent, of course, so it need not expend judicial resources continuously re-weighing a settled aspect of the balance.

The evidence Congress considered does not support its factual conclusions, and other evidence readily available to Congress flatly contradicts these factual conclusions. The findings have no rational basis, and therefore any legislative or constitutional conclusion based upon them must be seriously in doubt. Certainly the Court should not mirror Congress's missteps by incorporating seriously flawed factual findings and illogical arguments into the Court's own independent determination of the provision's constitutionality.

Whether or not formal factual findings exist or are used by the Court, the Court's obligation to conduct its constitutional analysis independently allows it to consider arguments and evidence not considered by Congress. If this were not so, then whenever the Congress did not make findings the Court would have no facts upon which to base its decision. The Women's Freedom Network has therefore provided additional evidence disproving the unsupported assertions cited by Congress and Petitioners.

B. Congress's finding that gender-motivated violence is a significant problem is irrational.

1. Congress considered no evidence concerning the prevalence of gender-motivated violence.

Petitioners are unable to point to any factual evidence in the record that supports the theory that gender motivated violence is a significant problem, apart from their repeated citations to the conclusory statements in the House and Senate reports that "crimes of violence motivated by gender have a substantial adverse effect on interstate commerce." Brz. Br. at 8 (quoting H.R. Conf. Rep. No. 103-711, at 385 (1994)), 10 (repeating first cite, and adding virtually identical conclusory quotation from Senate Report), 28 (paraphrasing quotations quoted on pages 8 and 10), 29 (referencing page 10, which includes both quotations); 37 (referencing congressional findings on earlier pages, but not providing any supporting facts); Gov't at 5, 17, 23.

Had there been such evidence presented, Petitioners would have cited it. Their failure to do so allows the Court to conclude that no such evidence is in the record.

2. Evidence about the incidence of violence against women generally, or about the incidence of rape and domestic violence, is not relevant to a determination of the incidence of gender-motivated violence.

Petitioners do cite evidence considered by Congress about the regrettable occurrence of violent acts committed against women, with particular emphasis upon evidence of rape and domestic violence. But they fail to cite factual evidence showing that such acts constitute *gender-motivated* violence.

At the hearings, certain amici did explain their viewpoint that virtually all violence against women is ipso facto gender motivated. *See, e.g.*, Women and Violence, *Hearings on Legislation to Reduce the Growing Problem of Violent Crime Against Women*, S.Hrg. 101-139, Pt. 1, at 36 ("we are trying to ... make it a policy of this country that rapes are hate crimes committed against women") (Statement of Senator Biden); at 63 ("[W]omen and girls who become victims of rape, domestic violence, and many other crimes are being attacked and killed because of their sex") (Statement of Helen Neuborne, then-director of NOW Legal Defense Fund). But Petitioners and their amici cannot now point to any factual evidence to support this political opinion, so this attempt to bootstrap evidence out of their own previously expressed opinions must fail.

In fact, however, and contrary to Petitioners' contentions, studies show that most violence is *not* due to gender animus against women.

For example, there is no evidence suggesting that rapists have greater hostility toward women than toward men. *See, e.g.*, Garfield E. Harmon, R. Glynn Owens, and Michael E. Dewey, *Rapists' Versus Non-Rapists' Attitudes Toward Women*, 39 International Journal of Offender Therapy & Comparative Criminology 269 (1995); *see also* Carolyn Kozma and Marvin Zuckerman, *An Investigation of Some Hypotheses Concerning Rape and Murder*, 4 Personality and Individual Differences 23 (1983).

Indeed, male homosexuals frequently experience date rape. *See* John L. Baier, Marianne G. Rosenzweig and Edward G. Whipple, *Patterns of Sexual Behavior, Coercion and Victimization of*

University Students, 32 Journal of College Student Development 311, 316 (1991).

Evidence also disproves the contention that female battering victims are targeted *because of* their gender. *See, e.g.*, Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U.L.Rev. 543, 547 (1992) (acknowledging that elder abuse and battering in same-sex couples subverts the "battering as sexism" model).

Rather than being motivated by gender, most offenders who direct violence at women do so for a variety of other reasons. For example, a robber who attacks a woman is likely doing so because she poses less of a threat to his own safety rather than because he has animus against women as a group. *Cf.* Randall Kennedy, *The Price to Pay for Racial Equality*, L.A. Times (June 17, 1997) (explaining that black taxi drivers who refuse pickups in dangerous areas do so "not because they are bigots but because they perceive that doing so will maximize their self-interest" in physical security); *see generally* Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 Harv. L.Rev. 1255 (1994) (explaining that crimes especially affecting blacks, and state failure to protect blacks against them, are not due to racial *bias*, but are the result of neutral factors with disproportionate effects).

Similarly, most male rapists who choose female victims do so because *the rapists themselves are heterosexual* rather then because they are biased towards women as a group. Homosexual male rapists usually choose male victims for the same reasons. *See also* Baier, *Patterns of Sexual Behavior*, *supra*, at 311 (homosexual men and women engage in sexually coercive behavior on dates).

In fact, misogynistic rapists, who intentionally target women because of their gender, are only a small minority of all rapists. *See* Jeanie Kasindorf, *Inside the Mind of a Rapist*, Redbook, Jan. 1993, at 77, 93 (interviewing rape researcher Robert Prentky); *see also* Robert A. Prentky, Murray Cohen, and Theoharis Seghorn, *Development of a Rational Taxonomy for the Classification of Rapists*, 13 Bulletin of the American Academy of Psychiatry & the Law 39 (1985).

Battering as a phenomenon is now understood to be caused by power struggles in a relationship, not by gender animus. *See, e.g.*, Baier, *Patterns of Sexual Behavior*, *supra* (male homosexual couples engage in battering); Vallerie E. Coleman, *Lesbian Battering*, 9 Violence and Victims 139 (1994) (lesbian couples engage in battering); *see also* Schneider, Challenges of Feminist Theory and Practice, 67 N.Y.U. L. Rev. at 543 (pathological dynamics present in males who batter their female partners are also present in caretakers who batter their elderly care recipients).

3. Even assuming that statistics about rape and domestic violence are relevant, they do not show that women experience such violence at a higher rate than men.

Women suffer from workplace crime at a much lower rate than men. Indeed, they constituted only 17% of workplace homicide victims in 1995. *See Census of Fatal Occupational Injuries* - 1994, *reprinted in* Bureau of Labor Statistics News (Aug. 3, 1995). Petitioners' repeated assertion that "homicide is the leading cause of death for women at work", Brz. Br. at 11; *see* Gov't at 7, merely reflects that womens' jobs generally do not pose the same risk of accidental injury as mens' jobs. In fact, 92% of workplace fatalities are male. *See* Bureau of Labor Statistics, *Fatal Occupational Injuries By Selected Worker Characteristics and Event or Exposure*, 1994, at 1.

Women are also less likely than men to be victimized while travelling. *See* BJS, *Sex Differences in Violent Victimization*, at 8 (Sept. 1997), available at http:\\ojp.usdoj.gov/bjs/pub/ascii/ sdvv.txt.

Furthermore, Congress's finding that "95% of all domestic violence victims are women," *see* Gov't at 6, is completely without foundation. Overwhelming evidence demonstrates that men are victimized by domestic violence at least as often as, if not more than, women. *See* Martin S. Fiebert, *References Examining Assaults by Women on Their Spouses/Partners*, in 1 Sexuality & Culture 273 (1998) ("85 scholarly investigations (70 empirical studies, and 15 reviews and/or analyses) ... demonstrate that women are as physically

aggressive, or more aggressive, than men in their relationships with their spouses or male partners").

Rape and sexual abuse also are not aimed exclusively at women. Indeed, the total number of male rape victims per year probably exceeds the number of female rape victims, once prison rapes are added to statistics. *See, e.g.*, Stephen Donaldson, *The Rape Crisis Behind Bars*, N.Y. Times, Dec 29, 1993 at A11. Furthermore, at least one-third of child sexual abuse victims are male. *See* S.D. Peters, G.E. Wyatt, and David Finkelhor, *Prevalance*, in Finkelhor et al, *A Sourcebook on Child Sexual Abuse* 15 (1986).

Male homosexuals may be at greater risk of date rape than are women. *See* Baier, *Patterns of Sexual Behavior, supra* at 316 (homosexual students – of whom 75% were male – reported a 50% higher incidence of date rape than did heterosexual female students).

And men suffer more injuries than women do from violent assaults. *See* Michael R. Rand, *Violence-Related Injuries Treated in Hospital Emergency Rooms*, in BJS Special Report, Aug. 1997, at 1 (men constitute about 60% of emergency room visitors seeking treatment for injury due to violence).

Indeed, women suffer from all types of crime (including rape) at a lower rate than men. *See* Sourcebook of Criminal Justice Statistics 1991, Table 3.19 at 275 (75% of homicide victims are male; two-thirds of robbery and assault victims are male; men are two and one-half times more likely to be victims of violent assault). Thus, while it may be true that significant numbers of American women will one day become crime victims, *see* Gov't at 6, men are much more likely to be victimized.

Finally, domestic violence is only a very small subset of all violence. Only slightly over 1% of female emergency room visitors are seeking treatment for an injury due to domestic violence. *See* Rand, *Violence-Related Injuries Treated in Hospital Emergency Rooms*, *supra*, at 5 (about 1.2%); U.S. Dep't of Health and Human Services, *Public Health Service, Physical Violence and Injuries in Intimate Relationships*, 45 Morbidity and Mortality Weekly Report (1996) (only 1% of New York female emergency room visitors were seeking treatment for injuries inflicted by domestic violence); Jean Abbot,

Robin Johnson, Jane Koziol-McLain, and Steven Lowenstein, *Domestic Violence against Women: Incidence and Prevalence in Emergency Room Populations*, 273 Journal of the American Medical Association 1763 (1995) (study of five emergency departments found that under two percent of female visitors were seeking treatment for injuries inflicted by domestic violence).

The Government's contention that "20 percent of hospital emergency cases are related to wife battering," *see* Gov't at 26, misreads the underlying survey, which found that this percentage of female emergency room visitors had at some prior point experienced some level of violence from a partner (including mere pushing and grabbing).

These surveys also show that as many or more male emergency room visitors have experienced domestic violence, belying the disproportionality rationale. *Id.* It should be noted that such surveys overrepresent the incidence of domestic violence, because they capture a large percentage of those suffering from injuries related to domestic-violence, but only a small percentage of the total population (specifically, that percentage that has recently experienced injury).

There is also no factual evidence to support Petitioners's contention that "as many as 50 percent of homeless women and children are fleeing domestic violence." Brz. Br. at 12, Gov't at 7 n.4. As a leading authority on domestic violence has stated, this "factoid ... [is] without any actual published scientific research to support it." Richard J. Gelles, *Domestic Violence Factoids*, available at http:\\www.mincava.umn.edu/papers/factoid.htm.

C. In sum, there is no evidence at all to support Congress's conclusory factual finding that gender-motivated violence is a significant problem. The Court owes this finding no deference, therefore, and certainly should not rely upon it in performing its own constitutional analysis.

III. Congress's Legislative Decision – That Any Indirect Causal Effects of Gender-Motivated Violence Upon Interstate Commerce Justify Legislation Targeting Gender-Motivated Violence – Fails a Rational Basis Test, Does Not Support its Own Constitutional Conclusions, and Should Not Be Relied upon by this Court in its Independent Constitutional Analysis.

Although deferential, the rational basis standard is not a nullity. There is no reasonable way that Congress could find that gender-motivated violence, or rape and domestic violence, or even all violence against women, substantially affect interstate commerce – and indeed they do not, at least in any way significant for Commerce Clause purposes. Congress's choice of a statutory scheme that targets gender-motivated violence, as a means of addressing whatever effects there are, is not only too overbroad and at the same time too underinclusive to be rational, but also exceeds its power under the Commerce Clause.

Even if the provision is read to reach all violence against women except that specifically qualifying as "random", it still cannot stand. A presumption that all violence against women is gender motivated either may discriminate against men by failing to presume that violence against men is also gender motivated, or remains overbroad by being applicable to virtually all male violence victims despite the lack of congressional concern about this group. An additional problem with the latter reading is that it belies the contention that the provision is intended to address the civil rights of a discrete group and would, even more than the other options, permit the federal government to intrude unduly into State domains.

A. Congress's choice to target gender-motivated violence, as a way of redressing whatever distortion of interstate commerce exists from violence against women, is irrational because gender-motivated violence is not the proximate cause of the effects found; rather, any such effects are caused by violence against women generally, or by the fear of such violence.

Almost none of the claimed relationships to interstate commerce are close enough to meet *Lopez*'s substantial relationship test. First, the arguments detailed by Petitioners all contain at least one extra step

before they reach interstate commerce. The claimed effect is not caused by the gender-motivated violence itself but by the *fear of* gender-motivated violence, the *fear of injury from* gender-motivated violence, or the *embarrassment at revealing the injury caused by* gender-motivated violence. All these phenomena may exist at least to some degree, but they make the effect of gender-motivated violence qualitatively more remote from interstate commerce.

Furthermore, evidence concerning causation is nonexistent or does not demonstrate a rational connection to interstate commerce. For example, citing evidence in the record that 50% of women avoid using public transportation because of their fear of rape, Brzonkala suggests that gender-motivated violence interferes with women's ability to travel. *See* Brz. Br. at 11. Yet a survey of teenage women showed that only 9% were concerned about being raped. *See* New York Times/ CBS News Poll: Complete Results, Oct. 1999, at NYTimes.com. Furthermore, women travelling locally[5] are most likely to be affected by crimes by strangers, rather than by gender-motivated violence. As explained above, very little rape is gender motivated. And three-fourths of reported incidents of domestic violence occur in the home. *See* Lawrence A. Greenfeld et al., *Violence by Intimates*, in BJS Factbook 11, Mar. 1998.

Similarly, even if women do refuse certain jobs because of the fear of attack, there is no evidence that they fear *gender-motivated* attacks while at work. Indeed, insofar as the attacks feared are more common at night, as Petitioners suggest, *see* Brz. Br. at 11, Gov't at 7, it is likely that they are related to the nature of the industry rather than the gender of the employee. Certainly the evidence, cited by Brzonkala, *see* Brz. Br. at 12, that some men harass their domestic partners while they work because they would prefer them not to work, belies the conclusion that gender-motivated violence affects work patterns. Even if this type of harassment or violence at work were gender motivated, changing or quitting their jobs would not alter

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[5] To the extent they are travelling interstate, the channels justification for regulation of commerce may apply, but § 13981 is vastly overbroad if gender-motivated violence in channels of interstate commerce is its only justification. See below.

affected womens' risk from or fear of this type of violence, because their domestic partners could just as easily follow them to their new jobs or other daytime locations. We also note, however, that the mere desire that a partner not work does not reflect gender animus, even if that desire is inappropriately expressed through violence.

To take another example, womens' reluctance to reveal their status as domestic violence victims (the embarrassment rationale) by going to work with visible injuries cannot show that gender-motivated violence causes an affect on interstate commerce. Whatever consequences such reluctance has on victims' ability to get and keep jobs is due to an intervening psychological state, and is simply too remote. Similarly, even if some college students drop out of school after a rape, such action is not *caused by* the rape but is due to other considerations such as the victim's reluctance to risk encountering the attacker or, perhaps, her "loss of concentration." Brz. Br. at 13. Brzonkala herself waited eleven months before deciding to withdraw - making any connection remote, to say the least. While we sympathize with the difficulties these women face, therefore, we vigorously dispute the implication that women are so much more delicate than men that a law can be premised upon their embarrassment.

That gender-motivated violence causes significant health care and other costs to the economy is also in doubt. Brzonkala's assertion that injuries resulting from violent crime cause such costs, *see* Brz. Br. at 12, does not provide evidence about the costs from gender-motivated violence.

B. Congress's choice to target gender-motivated violence is both underinclusive and overbroad, and therefore fails a rational basis test.

In structuring § 13981, the Government fails to reach the activity about which it is concerned, yet exceeds the reach permitted by any possible commerce justification. A provision's design is irrational if "the means selected by Congress are [not] reasonably adapted to the end permitted by the Constitution." *Preseult*, 494 U.S. at 17 (internal quotes omitted).

The provision is remarkably underinclusive. In targeting only gender-motivated violence, even though virtually no evidence was

presented about the effect of that particular kind of violence, it fails to reach the rape and domestic violence with which Congress seemed to be concerned. This almost total failure to address the subject of concern goes beyond Congress's general freedom to make policy choice, and rises to the level of irrationality.

In addition, the provision is vastly overbroad. The only possible effect upon interstate commerce that is not "remote" is the postulated relationship between gender-motivated violence and interstate travel. Such a relationship, insofar as gender-motivated violence ever occurs in the course of interstate travel, is likely reachable by Congress under its power to regulate "channels" of interstate commerce. But if an effect upon interstate travel is the only justification for its existence, § 13981 is so much too broad as to be irrational.

In light of these flaws, taken in conjunction with § 13981's detrimental effect upon state sovereignty, its noneconomic character, and the danger it poses by using a private cause of action as a remedy, the Court should hold that the design of the provision fails the rational basis test.

IV. In Any Case, As a Constitutional Matter After *Lopez*, Gender-Motivated Violence Cannot be Reached by the Commerce Power.

A. The tenuous relationship between gender-motivated violence and interstate commerce is not "substantial" as a constitutional matter, and Petitioners' suggested limits do not work.

Under the tests articulated in *Lopez*, gender-motivated violence is not within the commerce power because any effects it has upon interstate commerce are "so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely nationalized government." *Lopez*, 514 U.S. at 557. The number of steps Petitioners need in order to connect gender-motivated violence, or even rape and domestic violence, to interstate commerce is simply too great (particularly in the case of the embarrassment rationale).

Petitioners propose only two connections to interstate commerce: the decrease in national productivity, and the costs of crime. *See* Brz. Br. at 23-29; Gov't at 23-27. Both these rationales were unambiguously rejected in *Lopez* because they did not provide a limiting principle bounding the federal sphere. *See Lopez*, 514 U.S. at 564 (noting that lack of limitation would permit the federal government to intrude on "areas where States historically have been sovereign").

1. Petitioners' limiting principles do not provide effective limits.

Attempting to avoid the inevitable conclusion that their suggested connections are as invalid here as in *Lopez*, Petitioners seek to distinguish § 13981 by suggesting several limiting principles: the government's restraint in crafting the provision to exempt certain matters from its reach and to provide dual power to state and federal courts to adjudicate the private causes of action, *see* Brz. Br. at 32-35, Gov't at 34, the inability of the States to solve the problem, *see* Brz. Br. at 29-31, Gov't at 35, and the "civil rights" motivation for enacting the statute as a whole, *see* Brz. Br. at 23-26, Gov't at 34-35. None of these principles survive a closer look.

The Government's restraint, in drafting the provision less broadly than it might have done, is irrelevant. Such exercise of self-restraint may show that Congress considered constitutional limits while crafting § 13981 (and may have some use in the question whether Congress believed *rejected* characteristics were within the powers of the federal government), but it does not show that Congress would necessarily restrain itself in the next instance.

State inability to solve a problem does not move the outer boundary of the commerce power past the barriers placed by the Tenth Amendment. Nor are State requests that the federal government intervene at all relevant. The Tenth Amendment's concern for the States is not intended to benefit the States themselves by causing the federal government to do as they would like; it is intended rather to preserve the individual liberty guaranteed under the federal system. *See New York v. U.S.*, 505 U.S. at 181 ("The Constitution does not protect the sovereignty of the States for the benefit of the States .... To the

contrary, the Constitution divides authority between federal and state governments for the benefit of individuals"). Indeed, there are many problems that the States have failed to solve that would be inappropriate for the federal government to take on (except through its Spending power): other types of crime, unwed motherhood, and truancy, for example.

The "civil rights" motivation also does not provide any realistic limit upon the scope of the commerce power. In the first place, nearly everyone is a member of some sort of protected group (e.g., women, minorities, the elderly, the disabled, etc.) that undoubtedly differs from society at large in important ways. If the Commerce Clause permits Congress to legislate in order to remedy "bias" against any of these group, and bias is found in the disproportionate effects of events (such as crime) affecting society at large, then there is no limit at all. Furthermore, apart from asking whether Congress has the intent to redress a harmful effect upon interstate commerce, the Court does not inquire into the motivation underlying this intent, and wisely so. Such an inquiry would enmesh the Court in a tangle of irrelevant and conflicting motivations (e.g., desire for re-election, quid-pro-quos, pressure from donors or interest groups, desire to appear responsive to public concerns even though the Congress suspects a law may be unconstitutional, etc.) and would be disrespectful to the Congress.

Absent an effective limiting principle, the connection between gender-motivated violence and effects upon interstate commerce is far too tenuous to support jurisdiction over it based on the commerce power.

B. Congress's choice to target gender-motivated violence exceeds the reach of the commerce power because gender-motivated violence is not an economic activity.

1. Gender-motivated violence, as a non-economic activity, cannot be reached by the commerce power.

At its heart, this case presents the constitutional question whether violent criminal acts can be presumed to affect interstate "commerce"

within the meaning of the Commerce Clause. The Court should hold that they cannot.[6]

While the Court has refrained from giving a specific and positive definition of commerce, it has never held that non-economic activity falls with the Commerce Clause's purview.

Petitioners build their argument upon sweeping language in cases such as *United States v. Darby*, 312 U.S. 100 (1942) (the commerce power may extend to "those activities intrastate which [substantially] affect commerce or the exercise of the power of Congress over it", 312 U.S. at 119-120 (1941)) and *NLRB v. Jones & Laughlin Steel Corp.* ("intrastate activities, by reason of close and intimate relation to interstate commerce, may fall within federal control", 301 U.S. 1, 37 (1937)).

But Petitioners' argument has no foundation. It is an axiom of interpretation that expansive language in a case does not bind future Courts further than the facts in the case would allow. *See Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994) ("general expressions ... are to be taken in connection with the case in which those expressions are used"). And both *Darby* and *Jones & Laughlin* involved the economic activity of "industrial labor relations". *Jones & Laughlin*, 301 U.S. at 41; *see also id.* at 95 (McReynolds, J., dissenting) (objecting that majority's rationale would produce worst case scenario in which the commerce power would be found to extend to "all productive enterprises").

Every other prior commerce case – except *Lopez* – has also concerned Congress's power to regulate some aspect of productive enterprise, including *Heart of Atlanta* (sale of lodging), *McClung* (sale of food services), and *Wickard* (production of wheat that would "overhang[] the market" and thereby affect prices, 317 U.S. at 128).

The specific regulations in past cases targeted the manner or quantity of production or sale, and all the individuals or institutions

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[6] The question relates only to Congress's ability to enact a presumption. When a statute contains a jurisdictional element, the question whether a particular action may constitutionally be regulated under the commerce power will be answered by the trial court. That is not this case.

regulated were affected in their economic capacities (in the cited cases, as sellers and producers) at a time when they were in the very act of participating in the stream of interstate commerce (at the point of sale or production, in this instance). Neither § 922(q) nor § 13981 follows this pattern.

Indeed, the first point made by the *Lopez* Court, when it began its review of the provision at issue (after its review of past cases), was that section 922(q) "by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly defined." *Lopez*, 514 U.S. at 561.

Petitioners make no argument that can successfully distinguish gender-motivated violence from gun possession near a school, and indeed there is no argument they could make. Gender-motivated violence does not affect offenders or victims in any economic capacity as producers, distributors, sellers or the like, nor does it affect them at a time when they are participating in the interstate stream of commerce. Making an argument whose lack of quality reveals her desperation, Brzonkala argues that the purchase and subsequent use of educational services is an economic transaction with which the alleged rape interfered. *See* Brz. Br. at 41-42. But her cited case does not support the proposition that enjoyment of educational services, once purchased, is also an economic activity. Furthermore, as explained above, any interference with Brzonkala's education was the result of her decision eleven months later to withdraw, and was not cause by the alleged rape.

The Government does not stoop to this level. But insofar as the Government implicitly argues that the provision's place as one part of a larger statute can save it, *see* Gov't at 36 (arguing that VAWA as a whole is a "prototypical example of cooperative federalism"), it is incorrect. Section 13981's status as part of a larger scheme cannot save it from unconstitutionality, both because the VAWA as a whole is not a "regulation of economic activity" and because the provision is not an "essential" part of the statute. *See Lopez*, 514 U.S. at 561. (Even if the provision is "one of the most important components of the Act," *see* Gov't at 3, such importance does not demonstrate that it is "essential").

The Government also argues that invalidating § 13981 may create the potential that certain future problems may be unsolvable by any level of Government. *See* Gov't at 35. Insofar as the Government fears future inability to address a problem, its fear is unwarranted. States, of course, have plenary power to pass legislation concerning all problems outside the reach of the federal commerce power. Congress may also always act through the Spending power. Insofar as the Government fears it will be unable to *solve* such future problems, its astounding hubris does not require counterargument.

The simple and inescapable conclusion that § 13981 targets noneconomic activity, therefore, shows that it exceeds the reach of the commerce power, and the Court should so hold. In so doing, the Court will not be limiting its ability to decide future cases. It is not necessary to say where the line is in order to say that this provision falls well on its noneconomic side.

V. Section 13981 also cannot find justification in the Fourteenth Amendment, and so must be found unconstitutional.

A. The finding that there is gender bias in state justice systems is not supported by the evidence.

Although others will no doubt cover this topic in depth, we present a few examples to debunk the myth of State court bias.

First, even if States treat domestic violence less seriously than murders or robberies, the same treatment is given to other violent crime between acquaintances. Arrest rates for domestic and non-domestic disputes do not differ once levels of injury are taken into account. *See, e.g.,* Douglas A. Smith and Jody Klein, *Police Control of Interpersonal Disputes*, 31 Social Problems 468 (1984).

Second, States convict male murderers at equal rates, regardless whether the victim was the offender's spouse or was a (generally male) non-family member. *See* Patrick Langan and John M. Dawson, Spouse Murder Defendants in Large Urban Counties, BJS Special Report July 1994; *id.*, Sept. 1995 (two-year study of the 75 largest urban counties, accounting for more than half of total murders in U.S.).

Indeed, women receive far gentler treatment from the courts than men do. Women who committed unprovoked murders of their husbands received an average sentence of only seven years, whereas men who committed unprovoked murders of their wives received an average sentence of seventeen years. *See id.* at 3.

Brzonkala's comparisons of prosecution and conviction rates between murder cases and rape cases are not appropriate. *See* Brz. Br. at 16. In murder cases, it is generally clear that a crime has been committed, because a person is dead; furthermore, the law does not recognize consent to murder. Rape prosecutions, on the other hand, often must prove both the question of consent and the question whether a crime has been committed (unless there is physical evidence of injury), and the factfinder often must decide between two conflicting versions of the event, neither of which is supported by other evidence.

The proper comparison, therefore, is between treatment of rape cases and treatment of felony assault cases, because these also often involve acquaintances who each tell uncorroborated and conflicting stories. And prosecution and conviction rates for rape and for violent assault are almost identical. *See* U.S. DOJ, Bureau of Justice Statistics, Tracking Offenders 2 (June 1991) (eight-state study showed that 80 percent of those arrested for sexual assault were prosecuted, compared with 77 percent of those arrested for felony assault; 54 percent of those prosecuted for sexual assault were convicted, but only 46 percent of those prosecuted for felony assault were convicted).

Finally, many of the evidentiary rules against which Petitioners complain are designed to ensure fairness to defendants, who are entitled to the presumption of innocence. Eliminating such rules – for example, by failing to question an inconsistent story – would risk grave injustice to men. *See, e.g.*, S.Rep. 103-138 (Sept. 10, 1993) (suggesting there is anti-female bias in fact that court personnel "question the credibility of rape victims based on ... matters that are irrelevant ... For example, they may require a woman ... to tell a consistent story"); S.Hrg. 103-878 (Nov. 16, 1993) (quoting Senator Cohen's assessment that gender bias was revealed in case where jury failed to find that wife's cutting off husband's private parts was conclusive proof that husband had committed rape).

B. Because there is insufficient evidence of bias, there is no need for the Congress to act. In any case, the remedy chosen was neither congruent nor proportional. The Court should therefore hold that it exceeded Congress's authority under the Fourteenth Amendment.

CONCLUSION

The judgment of the *en banc* United States Court of Appeals for the Fourth Circuit should therefore be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

CHRISTY BRZONKALA,

Petitioner,

v.

ANTONIO J. MORRISON, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICI CURIAE* OF NATIONAL NETWORK TO END DOMESTIC VIOLENCE, NATIONAL NETWORK TO END DOMESTIC VIOLENCE FUND, FLORIDA COALITION AGAINST DOMESTIC VIOLENCE, HAWAII STATE COALITION AGAINST DOMESTIC VIOLENCE, IOWA COALITION AGAINST DOMESTIC VIOLENCE, MICHIGAN COALITION AGAINST DOMESTIC AND SEXUAL ASSAULT, NEW HAMPSHIRE COALITION AGAINST DOMESTIC AND SEXUAL VIOLENCE, NEW JERSEY COALITION FOR BATTERED WOMEN, NEW YORK STATE COALITION AGAINST DOMESTIC VIOLENCE, NORTH DAKOTA COUNCIL ON ABUSED WOMEN'S SERVICES, PENNSYLVANIA COALITION AGAINST DOMESTIC VIOLENCE, RHODE ISLAND COALITION AGAINST DOMESTIC VIOLENCE, VERMONT NETWORK AGAINST DOMESTIC VIOLENCE AND SEXUAL ASSAULT, AND VIRGINIANS AGAINST DOMESTIC VIOLENCE, IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

Nos. 99-29 & 99-5

CHRISTY BRZONKALA,
Petitioner,

v.

ANTONIO J. MORRISON, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF NATIONAL NETWORK TO END DOMESTIC VIOLENCE, NATIONAL NETWORK TO END DOMESTIC VIOLENCE FUND, *ET AL.* IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE* *

Amici Curiae National Network to End Domestic Violence, National Network to End Domestic Violence Fund, Florida Coalition Against Domestic Violence, Hawaii State Coalition Against Domestic Violence, Iowa Coalition Against Domestic Violence, Michigan Coalition Against Domestic and Sexual Violence, New Hampshire Coalition Against Domestic and Sexual Violence, New Jersey Coalition for Battered Women, New York State

* Pursuant to Rule 37.6, *Amici Curiae* state that no counsel for any party authored this brief in whole or in part and no person or entity, other than the *Amici Curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

All parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk of the Court.

Coalition Against Domestic Violence, North Dakota Council on Abused Women's Services, Pennsylvania Coalition Against Domestic Violence, Rhode Island Coalition Against Domestic Violence, Vermont Network Against Domestic Violence and Sexual Assault, and Virginians Against Domestic Violence (*"amici"*) submit this brief in support of Petitioner. The interest of *amici* are described in the Appendix to this brief.

SUMMARY OF ARGUMENT

Domestic violence is a national crisis. For millions of women, some of whose stories are noted herein, violent physical abuse and mental and emotional trauma are part of everyday life. Prior to the enactment of the Violence Against Women Act ("VAWA"), such abuse was compounded by a lack of response from historically inadequate state civil and criminal legal systems. Congress responded by enacting the VAWA to offer a comprehensive response for the victims of domestic violence. With the passage of the VAWA, Congress provided a civil rights cause of action to enable the victims of gender-motivated crimes like domestic violence to remedy past injuries and to hold the perpetrators of gender-motivated crimes accountable for their actions.

After conducting four years of hearings and amassing a voluminous legislative record, Congress appropriately determined that gender-motivated violence substantially affects interstate commerce. Moreover, Congress recognized that bias and discrimination in the states' civil and criminal justice systems often deprive victims of crimes of violence motivated by gender of equal protection of the laws and the redress to which they are entitled. For these reasons, the VAWA is plainly constitutional under the Commerce Clause and section 5 of the 14th Amendment, and the opinion of the *en banc* Fourth Circuit Court of Appeals should be REVERSED.

ARGUMENT

THE EXPERIENCES OF WOMEN CLEARLY DEMONSTRATE THAT, PRIOR TO VAWA, REMEDIES WERE SORELY INADEQUATE TO ADDRESS THE NEEDS OF VICTIMS OF DOMESTIC VIOLENCE.

> [M]y husband stabbed me 13 times and broke my neck while the polic were on the scene. I nearly died and I am permanently paralyzed, and physically and mentally scarred for life. . . . When the police did arrive and get the knife from him, they turned their backs on him and he was able to further do more damage by coming over to me and breaking my neck, stepping on my head and breaking my neck. I lost all feeling. He ran upstairs and grabbed our little boy and carried him downstairs and said, "I killed your f—ing mother." [1]

Tracey Motuzick's words vividly illustrate the problem Congress sought to remedy by creating a civil rights remedy for victims of violent crime motivated by gender. Hers is a story shared by many battered women. Indeed, during the four years of hearings prior to passage of the Violence Against Women Act ("VAWA"),[2] Congress heard from many of these women, who documented the impact of gender-based violence on their lives and the nation. Moreover, women also explained to Congress how their treatment by the existing legal system—both civil and criminal—had exacerbated the abuse they experienced. The stories of these women, and others cited in this brief, clearly illustrate the rationale behind Congress's decision

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1 *Women and Violence Hearings before the Senate Comm. on the Judiciary*, 101st Cong., Part 2, 99 (1990) (statement of Tracey Motuzick).

2 Pub. L. No. 103-322, Title IV, 108 Stat. 1992 (codified as amended in scattered sections of Titles 8, 18, and 42 U.S.C.).

to enact a Federal civil rights remedy for gender-motivated violence.[3]

A. Domestic Violence Devastates The Lives of Millions Of Women and Substantially Affects Interstate Commerce.

As the Congressional Record of the hearings preceding the passage of the VAWA attests, violence against women is an enormous problem throughout the United States.[4] A recent study reports that 5.9 million assaults are perpetrated against women annually.[5] During 1992-1993, women were six times more likely to experience violence by an intimate partner than men.[6] Estimates of the number of women severely injured each year by their partners

[3] Passage of the civil rights remedy, Senator Biden stated, was an effort to "change the Nation's attitude" and "heighten public awareness" about "violence that is directed against women for the sole reason that they are women," just as public sentiment was changed by reduction in drunk driving levels and creation of a civil rights remedy for victims of racially motivated violence. *Women and Violence: Hearings before the Senate Comm. on the Judiciary*, 101st Cong., Part 1, 2-3 (1990) (statement of Senator Biden).

[4] This brief focuses on violence against women because the victims of domestic violence and sexual assault are nearly always women. The United States Department of Justice estimates that 95% of reported assaults on spouses or ex-spouses are committed by men against women. *See* H. Douglas, *Assessing Violent Couples*, 72(9) Families in Society 525-536 (1991).

[5] Patricia Tjaden and Nancy Thoennes, National Institute of Justice, *Prevalence, Incidence and Consequences of Violence Against Women* 5 (1998). Indeed, evidence prior to passage of the civil rights remedy demonstrated that violence against women was increasing. In 1991 the Senate Committee on the Judiciary reported: "[s]ince 1974, assaults against young women have risen by an astounding 50 percent, while assaults against young men have dropped by 12 percent." *Violence Against Women: Victims of the System: Hearing before the Senate Comm. on the Judiciary*, 102nd Cong., 258 (1991) (statement of Leslie R. Wolfe).

[6] United States Department of Justice, *Bureau of Justice Statistics Special Report: Violence Against Women: Estimates from the Redesigned Survey* 1 (1995).

range from at least two million to four million and higher,[7] and seventy percent of intimate homicide victims are female.[8] Indeed, domestic violence is the single leading cause of injury to U.S. women, accounting for more injuries and deaths than auto accidents, muggings and rapes combined.[9]

Sarah Buel, herself a victim of domestic violence, has documented the types of physical abuse that occurs throughout the country:

> [Battered women] are run over by cars and trucks. They have their teeth knocked out with hammers. They are raped with hot curling irons and large objects. They are stabbed with screw drivers, ice picks, and knives. They are beaten, choked and strangled. They are beaten in public in the streets. They are beaten in the privacy of their own homes, often in front of their children. . . .[10]

[7] S. Rep. No. 101-545, at 36 (1990). Statistical evidence documenting the number and frequency of women who are abused varies annually. In 1994, Congress found that four million women are battered by their partners each year. *See* H.R. Rep. No. 103-711, at 383-384 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1839, 1851-52. That same year, Congress reported that one third of murdered women "die at the hands of a husband or boyfriend." *Domestic Violence: Not Just a Family Matter; hearing before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 103rd Cong., 2 (1994) (statement of Rep. Charles Schumer).

[8] United States Department of Justice, *Bureau of Justice Statistics Selected Findings: Violence Between Intimates* 2 (1994).

[9] *Violence Against Women: Victims of the System Hearing before the Senate Comm. on the Judiciary*, 102nd Cong., 25 (1991) (statement of Iowa Attorney General Bonnie J. Campbell).

[10] Sarah M. Buel, *The Dynamics of Domestic Violence Cases in the United States: An Overview, in* Defending Women in Criminal Cases § A, at 1 (ABA Section of Criminal Justice and the Division for Professional Education eds., 1993). *See also* Susanne M. Browne, Note, *Due Process and Equal Protection Challenges to the*

Another victim of domestic violence, Charlotte Fedders, described "17 years of black eyes, bruises" and other injuries during a hearing of the Senate Judiciary Committee, testifying that her "first episode was a broken ear drum, one slap to the face and he broke my ear drum." [11]

Physical injuries such as shattered bones, scratches, bruises, and burns are only the most visible consequences of domestic abuse. Yet, the emotional and mental harm can be equally severe: battered women fear for their safety, expect violence to recur, lose their self-esteem, and feel out-of-control and trapped.[12] They commonly feel a sense of terror, depression, grief, anger, rage, hatred, and shame. One victim of domestic assault, Georgia Hare, testified how her husband dehumanized her to justify his abuse: "I was frequently told that I 'was just like a dog, too stupid to learn so I had to be beaten.'" [13] Battered women also are known to develop nightmares, sexual dysfunctions, concentration problems, and addictions that are a direct result of experiencing battery.[14] Domestic violence is abuse of the mind and spirit as well as the body.

In addition to the personal toll on individual women, the high incidence and severity of these violent crimes

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Inadequate Response of the Police in Domestic Violence Situations, Cal. L. Rev. 1295 (1995).

11 *Women and Violence: Hearings before the Senate Comm. on the Judiciary*, 101st Cong., 104 (1990) (statement of Charlotte Fedders).

12 Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redeficition of Battered Woman Syndrome*, 21 Hofstra L. Rev. 1191 (1993) (citations omitted).

13 *Violent Crimes Against Women: Hearing before the Senate Comm. on the Judiciary*, 103rd Cong., 17 (1993) (statement of Georgia Hare).

14 Dutton, *supra* note 12, at 1221-1222.

carries high costs for the nation and therefore substantially affects interstate commerce. Indeed, battering has been cited as the most frequent reason why women are treated in emergency rooms,[15] with medical costs for victims of domestic violence reportedly reaching over $100 million annually.[16] Employee absenteeism and sick days were reported to cost employers between three and five billion dollars every year.[17] As one victim of domestic violence stated,

> I missed a lot of time from work. I was late. I called in sick a lot. When I was at work it was hard to concentrate. How can you concentrate on your job when you know you're going to get beaten when you get home.[18]

The total cost of domestic violence to the American economy may be between five and ten billion dollars annually.[19]

As these statistics demonstrate, and as Congress properly recognized, domestic violence is a national tragedy that substantially affects the national economy.[20] Domestic

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15 Howard Holtz & Kathleen Furniss, *The Health Care Providers Role in Domestic Violence*, 8 Trends in Health Care, Law & Ethics 47 (Spring 1993).

16 *Women and Violence: Hearings before the Senate Comm. on the Judiciary*, 101st Cong., 58 (1990) (statement of Helen Neuborne).

17 *Id.*

18 Francine Knowles, *Employers Are Learning Cost of Domestic Violence*, The Chicago Sun Times, Sept. 30, 1996.

19 Harris Meyer, *The Billion-Dollar Epidemic*, Am. Med. News, Jan. 6, 1992, at 7 (including costs attributed to health care, investigative and protective services, the criminal justice system, police forces, and lost worker productivity).

20 Four years of hearings and the voluminous legislative record demonstrate that each of Congress's findings as to the substantial, deleterious impact of gender-based violence on interstate commerce

violence results in physical and psychological injury to millions of women in this country every year. The insidious impact of the violence ripples through families, communities and even generations. It is indisputable that for both victims and society, domestic violence levies an enormous physical, mental and economic toll.

B. The Civil Rights Remedy Provided by the VAWA Offers a Means to Address Past Injuries, While at the Same Time Making the Perpetrators of Gender-Motivated Crime Accountable for Their Actions.

Armed with this knowledge, Congress created a federal civil rights cause of action for individuals who are victims of crimes of violence motivated by gender. *See* 42 U.S.C. § 13981 (the "civil rights remedy"). This step was taken based on findings that existing federal and state laws were inadequate to "protect against the bias element of crimes of violence motivated by gender, which separates these from acts of random violence" and to "provide victims of gender motivated violence the opportunity to vindicate their interests." [21]

To ensure that the federal cause of action would be limited to civil rights violations, as opposed to "random violence," the law defines a "crime of violence motivated by gender" as a crime of violence that is committed "because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender." 42 U.S.C.

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is grounded in abundant evidence. As is set forth in detail in the other briefs on behalf of the petitioner, Congress had a rational basis for concluding that gender-based violence substantially affects interstate commerce and in enacting the VAWA. Thus, Congress had the authority to enact the civil rights remedy of the VAWA pursuant to the Commerce Clause. See U.S. Const. art. I, § 8, cl. 3.

[21] H.R. Conf. Rep. No. 103-711, at 385 (1994) *reprinted in* 1994 U.S.C.C.A.N. 1839, 1853.

§ 13981(d)(1).[22] The definition of "crime of violence" is limited to felony-level acts against a person, or against property when the acts pose "serious risk of physical injury to another." 42 U.S.C. § 13981(d)(2). And the definition explicitly includes those acts that would constitute a felony "but for the relationship between the person who takes such action and the individual against whom such action is taken." 42 U.S.C. § 13981(d)(2). This qualification serves to equalize the treatment of perpetrators of assault, regardless of whether the perpetrator is related to the victim.

By allowing compensatory and punitive damages, injuctive and declaratory relief, and attorney's fees, the civil rights remedy provides a necessary means by which abused women may seek redress. *See* 42 U.S.C. § 13981(c). These comprehensive remedies serve to empower victims of domestic violence—enabling them to reclaim their lives —while at the same time holding perpetrators accountable for their violent actions and sending the perpetrators a strong message that acts of violence can have serious consequences. The availability of injunctive relief is particularly useful because it gives victims the opportunity to pursue contempt proceedings if a batterer continues harassing them after the relief is granted.[23] And declaratory

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[22] In the procedural context in which the instant case is now before the Court, the Court must evaluate the constitutionality of the law as if the facts below present a valid claim and determine if, under any circumstances, a violent crime motivated by gender may be actionable as a Federal civil rights violation Thus, whether or not the Court believes the instant case presents sufficient evidence of gender animus to constitute a "crime of violence motivated by gender" is irrelevant for purposes of the Court's review of the constitutionality of the civil rights remedy. The Court can strike down the law only if it finds that there is no set of facts under which Congress may create a civil rights remedy for crimes of violence motivated by gender.

[23] Daniel G. Atkins, *et al., Striving for Justice with the Violence Against Women Act and Civil Tort Actions*, 14 Wis. Women's Law J. 69, 83 (1999).

relief—a declaration that an abuser committed violent acts motivated by gender—may provide the victim satisfaction and the abuser with some shame and regret.[24]

Moreover, the potential compensatory damages provided by the statute can help a woman to recover financially while she recovers emotionally. Damages awards, however small, may provide the necessary money for women to begin turning their lives around. This is particularly so given that the victim's economic welfare is typically dependent on her batterer:

> [M]any domestic violence victims are economically dependent on the men who abuse them, few victims have the resources necessary to begin a new life for themselves and their children. Batteries commonly isolate battered women from financial resources. For example, many battered women do not have ready access to cash, checking accounts, or charge accounts. One study showed that 27% of battered women had no access to cash, 34% had no access to a checking account, 51% had no access to charge accounts, and 22% had no access to a car.[25]

To date, less than fifty reported decisions have involved claims for civil rights remedies under the VAWA, which include underlying offenses of domestic abuse, rape, assault and battery, sexual assault and sexual harassment.[26] As

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[24] *Id.*

[25] *See* Martha F. Davis & Susan J. Kraham, *Protecting Women's Welfare in the Face of Violence*, 22 Fordham Urb. L. J. 1141, 1150 (1995).

[26] *See Gross v. Weber*, 186 F.3d 1089 (8th Cir. 1999); *McCann v. Rosquist*, 185 F.3d 1113 (10th Cir. 1999); *Brzonkala v. Virginia Polytechnic Inst. and State Univ.*, 169 F.3d 820 (4th Cir. 1999) (en banc), *cert. granted*, 1999 WL 459152 (U.S. Sept. 28, 1999) (No. 99-5); *MacKenzie v. Smith*, 182 F.3d 917, 1999 WL 455377 (6th Cir. 1999) (unpublished table decision); *Henderson v. Heartland Press, Inc.*, No. C97-4086-PAZ, 1999 WL 875744 (N.D. Iowa Oct. 13, 1999); *Santiago v. Alonso*, No. 97-2737 (DRD), 1999 WL 688137 (D.P.R. Aug. 27, 1999); *Williams v. Board of County Commissioners of Wyandotte County*, No. 98-2485-JTM, 1999 WL 690010 (D. Kan. Aug. 24, 1999); *LeBlanc v. Lee*, No. Civ. A. 97-1811, 1999 WL 670976 (E.D. La. Aug. 24, 1999); *Thomasson v. U.S.*, No. 99-3165-JTM, 1999 WL 690098 (D. Kan. Aug. 23, 1999); *Whitaker v. Mercer County*, No. CIV. 97-3813 (GEB), 1999 WL 754119 (D.N.J. Aug. 23, 1999); *Peddle v. Sawyer*, No. 398CV2364 (WWE), 1999 WL 613312 (D. Conn. July 22, 1999); *Dill v. Oslick*, No. CIV. A 97-6753, 1999 WL 508675 (E.D. Pa. July 19, 1999); *Kuhn v. Kuhn*, No. 98 C 2395, 1999 WL 519326 (N.D. Ill. July 15, 1999); *Bergeron v. Bergeron*, 48 F. Supp. 2d 628 (M.D. La. 1999); *Sears v. Lessley*, No. 99-1088-WEB, 1999 WL 641238 (D. Kan. May 20, 1999); *Wright v. Wright*, No. Civ-98-572-A (W.D. Okla. Apr. 27, 1999); *Ericson v. Syracuse Univ.*, 45 F. Supp. 2d 344 (SD.N.Y. 1999); *Culberson v. Doan*, No. C-1-07-965, 1999 WL 765970 (S.D. Ohio Apr. 8, 1999); *Wesley v. Don Stein Buick, Inc.*, 42 F. Supp. 2d 1192 (D. Kan. 1999); *Doe v. Mercer*, 37 F. Supp. 2d 64 (D. Mass. 1999); *Grimm v. Shroyer*, 35 F. Supp. 2d 966 (ED. Ky 1999); *Liu v. Striuli*, 36 F. Supp. 2d 452 (D.R.I. 1999); *Truong v Smith*, 28 F. Supp. 2d 626 (D. Colo. 1998); *Ziegler v. Ziegler*, 28 F. Supp. 2d 601 (D. Wash. 1998); *Comardelle v. Hernandez*, 26 F. Supp. 2d 897 (E.D. La. 1998); *Dolin v. West*, 22 F. Supp. 2d 1343 (M.D. Fla. 1998); *Griffin v. City of Opa-Locka, Fla.*, No. 98-1550-CIV-HIGH-SMITH (S.D. Fla. Aug. 27, 1998); *C.R.K. v. Martin*, No. CI.A. 96-1431MLB, 1998 WL 1100062 (D. Kan. July 10, 1998); *Timm v. DeLong*, No. 8:98CV43, 1998 WL 1100082 (D. Neb. 1998); *Bridges v. City of Dallas*, No. Civ. 3:98-CV-0090-H, 1998 WL 320286 (N.D. Tex. June 8, 1998); *Braden v. Piggly Wiggly*, 4 F. Supp. 2d 1357 (M.D. Ala. 1998); *Palazzolo v. Ruggiano*, 993 F. Supp. 45 (D.R.I. 1998); *Mattison v. Click Corp.*, 72 Empl. Prac. Dec. P. 45, 209, 1998 WL 32597 (E.D. Pa. Jan. 27, 1998); *Crisonino v New York City House. Auth.*, 985 F. Supp. 385 (S.D.N.Y 1997); *Finley v. Higbee Co.*, 1 F. Supp. 2d 701 (N.D. Ohio 1997); *Anisimov v. Lake*, 982 F. Supp. 531 (N.D. Ill. 1997); *Seaton v. Seaton*, 971 F. Supp. 1188 (E.D. Tenn. 1997); *Doe v. Hartz*, 970 F. Supp. 1375 (N.D. Iowa 1997), *rev'd on other grounds*, 134 F.3d 1339 (8th Cir. 1998); *Newton v. Coca-Cola Bottling Co. Consol.*, 958 F. Supp. 248 (W.D.N.C. 1997); *Doe v. Doe*, 929 F. Supp. 608 (D. Conn. 1996); *Young v. Johnson*, No. CV 97-90014 (Ariz Super. Ct. 1999); *Fahey-*

evidenced in these cases, courts have been selective in applying the crime of violence definition to the alleged underlying crimes, thereby dismissing cases in which the plaintiffs fail to demonstrate the requisite gender-based

animus.[27] As a result of judicial selectivity, plaintiffs who were allowed to proceed with their claims under the civil rights remedy of the VAWA bear stories of severe and prolonged abuse in numerous contexts, such as family, work, school, church and community.[28] The depth and severity of abuse that is reflected in these cases is also shown in the number of the VAWA claims that were brought on behalf of domestic violence victims whose lives were ended by their batterers.[29]

In the first case in which a court upheld the civil rights remedy's constitutionality, the plaintiff was a woman who

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Hosey v. Capano, No. 98C-06-299 SCD, 1999 WL 743985 (Del. Aug. 31, 1999); *Manikhi v. Mass Transit Admin.*, 733 A.2d 372 (Md. Ct. Spec. App. 1999); *Fisher v. Grimes*, No. 98 CVD 865 (N.C. Gen. Ct. Justice 1999).

[27] *See Henderson v. Heartland Press, Inc.*, No. C97-4086-PAZ, 1999 WL 875744 (N.D. Iowa Oct. 13, 1999) (finding that plaintiff failed to allege a crime of violence under the statute where she was coerced by a fellow male employee into a car, driven to a deserted spot and kissed against her will); *LeBlanc v. Lee*, No. Civ. A. 97-1811, 1999 WL 670976 (E.D. La. Aug. 24, 1999) (granting defendant's motion to dismiss the VAWA claim where female plaintiff was pushed and knocked unconscious by a man on the street).

[28] *See Williams v. Board of County Commissioners of Wyandotte County*, No. 98-2485-JTM, 1999 WL 690101 (D. Kan. Aug. 24, 1999) (upholding claim under the VAWA civil rights remedy where plaintiff was raped and harassed by an on-duty police officer); *Liu v. Striuli*, 36 F. Supp. 2d 452 (D.R.I. 1999) (upholding the constitutionality of the VAWA civil rights remedy where graduate student was repeatedly harassed, battered and raped by college immigration advisor); *Anisimov v. Lake*, 982 F. Supp. 531 (N.D. Ill. 1997) (finding that employee who was forcibly raped, fondled, assaulted and harassed by employer had stated a sufficient claim under the VAWA); *Doe v. Hartz*, 970 F. Supp. 1375 (N.D. Iowa 1997) (finding that priest's unwelcome touching and sexual advances toward female parishioner constituted a crime of violence under the VAWA).

[29] *See Sears v. Lessley*, No. 99-1088-WEB, 1999 WL 64641238 (D. Kan. May 29, 1999); *Culberson v. Doan*, 1999 WL 765970 (S.D. Ohio April 8, 1999); *Comardelle v. Hernandez*, 26 F. Supp. 2d 897 (E.D. La. 1998).

had been physically and mentally victimized by her husband throughout their seventeen-year marriage. *Doe v. Doe*, 929 F. Supp. 608 (D. Conn. 1996). The plaintiff sought compensatory and punitive damages under the VAWA for the continuous cruelty exerted upon her by her husband through means of physical assault, threats, property destruction and coercion. In the court's order denying defendant's motion to dismiss, the U.S. District Court highlighted the extensive statistical, medical and economic data upon which Congress relied in finding that gender-based violence has a substantial effect on interstate commerce. *Doe*, 929 F. Supp. at 614.[30]

C. By Enacting the VAWA Civil Rights Remedy, Congress Recognized That Existing State Civil Tort Remedies, Local and State Criminal Laws, and State Civil Protection Orders Were Inadequate.

When domestic violence victims muster the strength and courage to confront their batterers, they not only combat abuse by their batterers, but often confront unresponsive or even openly hostile state actors within the legal system. By enacting the civil rights remedy provision in the VAWA, Congress intended to respond to the inadequacies of the justice system to address gender-motivated violence.[31]

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[30] Furthermore, in looking at Jane Doe's case, the court found that the VAWA "does not encroach on traditional areas of state law" but rather "complements them by recognizing a societal interest in ensuring that persons have a civil rights to be free from gender-based violence." *Id.* at 616.

[31] As is discussed in the briefs of the petitioner and other *amici*, Congress had the authority under section 5 of the 14th Amendment to create a Federal civil rights cause of action in the VAWA. See U.S. Const. amend. XIV, § 5. In enacting the VAWA, Congress concluded that such a remedy was necessary given the disparate manner in which the existing law system historically treated victims of violent gender-based crimes. Under the 14th Amendment, there is no clearer case of Congress's power to legislate when States have failed to protect equal rights and when "the criminal justice system

1. *Congress Found State Civil Systems Inadequate To Vindicate Victims' Rights.*

Congress heard throughout its hearing process preceding the enactment of the VAWA about limitations in the state system that made it difficult for women to obtain justice through state civil processes. Congress found state civil assault and battery laws, for example, do not provide a means to protect the civil rights of women who are victims of gender-motivated crime.[32] Congress heard testimony about barriers to filing claims under state tort law—such as interspousal immunity, evidentiary limitations, and statutes of limitations—that make access to existing state civil remedies difficult.[33]

The doctrine of interspousal immunity prohibits spouses from suing each other for injuries in tort. In some states this barrier prevents a woman battered by her husband from suing him to collect damages for her medical expenses, pain, and suffering.[34] Even though the interspousal tort immunity doctrine has been abrogated in most states, its existence until recently has contributed to the societal bias underlying the law's treatment of gender-motivated crimes.

In addition, state evidentiary rules that allow widespread use of the victim's prior sexual practices limit the likelihood that victims will file suit and hold their batterers liable.[35] Faced with the possibility of having their

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is not providing equal protection of the laws of women in the classic sense." S. Rep. No. 103-138, at 55 (1993).

32 S. Rep. No. 101-545, at 42 (1990).

33 *Crimes of Violence Motivated by Gender: Hearing before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary*, 103rd Cong. 8-9 (statement of Sally Goldfarb).

34 *Id.*

35 Leonard Karp & Sheryl I. Karp, *Domestic Torts Family Violence, Conflict, and Sexual Abuse* 40 (1999).

lives torn further apart by zealous defense advocates, many victims will shrink from pursuing their claims. A claim filed in Federal court under the VAWA, however, will not subject victims to the same invasion of privacy because it is covered by the Federal Rules of Evidence, which, due to revisions of such Rules enacted with the VAWA, preclude the use of women's prior sexual history.[36]

Likewise, state statutes of limitations may preclude a domestic violence victim from filing a tort claim. Unlike a car accident plaintiff or a medical malpractice plaintiff, a domestic violence victim rarely recognizes that her injuries are of the kind for which legal redress is appropriate for months or years after the battering begins because she perceives the violence as isolated, temporary, or, worse, her own fault. Typically, fear of reprisal further delays her ability to seek judicial assistance. When a state statute of limitations begins running from the date of the first attack,[37] battered women frequently find themselves unable to bring tort claims for the years of damages inflicted upon them by their batterers.

Limits on damages under state tort claims may also hinder the chances that batterers will be held accountable to their victims. Damages, such as punitive damages and attorneys' fees, are often prohibited in state tort actions.[38] The prospect of recovering attorneys' fees, with the additional potential for punitive damages, enables women who do not have the means to pursue a state tort remedy to seek redress under the VAWA.[39]

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36 Fed. R. Evid. 412.

37 Atkins *supra* note 23, at 64.

38 Karp & Karp, *supra* note 35, at 40-41.

39 This is particularly so in cases of domestic violence, as the victim's economic welfare is likely to be controlled by the batterer. *See* Atkins, *supra* note 23.

2. *The Civil Rights Remedy Provided by the VAWA Was Necessary to Overcome Inadequate State and Local Criminal Laws.*

In 1990, Ms. Buel appeared before the Senate Committee on the Judiciary and bravely detailed her ordeal living with a battering husband and described her experience with an unresponsive and uncooperative state criminal justice system:

> When I first left, the police would tell me that I should really just make sure I did not make my husband mad, and the judges would tell me that it was my job to keep the family together, and I could not find a prosecutor that would listen to me, because this [her experience] was just a domestic squabble, but that was even years down the line." [40]

Outdated attitudes and inadequate institutional structures have prevented the states' criminal justice systems—including police, prosecutors, and judges—from effectively dealing with the crime of domestic abuse.[41]

a) *The civil actions provided by the VAWA were necessary to overcome the historically ineffective state and local police efforts.*

One victim of domestic violence described one police officer's response to her plight as follows:

> If you ever call the police again, I will see to it that you are arrested and you'll never see those two kids again.[42]

Indeed, as much as one-third of all police calls involve domestic disturbances such as assault and battery, argu-

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[40] *Women and Violence: Hearings before the Senate Comm. on the Judiciary*, 101st Cong., 124 (1990) (statement of Sarah Buel).

[41] *Developments in the Law—Legal Responses to Domestic Violence*, 106 Harv. L. Rev. 1497, 1552 (1993).

[42] *Watson v. City of Kansas City*, 857 F.2d 690, 692 (1988).

ments, physical violence and infliction of injuries between intimate partners.[43] Traditionally, the police often assigned domestic violence calls low priority and have reluctantly responded to abuse calls. Police referred to domestic disturbance calls as simply nuisance calls: repeatedly going "to the same houses for 'lovers quarrels' that required them to play social worker." [44] Historically, police officers were instructed, based on an official nonarrest policy, to "cool down" these "domestic disputes" by "adjustment without arrest." [45] A typical response of police to battering was to tell women, "There's nothing we can do; this is a civil matter," or to make one party leave the home.[46]

Throughout the 1980s, as domestic violence calls increased, police departments established written policies and standards, many police officers received domestic violence training, and the "noncrime" [47] of assault and battery of spouses became officially defined as criminal behavior. Even with the changes, however, intervening

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[43] Loretta J. Stalans, *Family Harmony or Individual Protection? Public Recommendations About How Police Can Handle Domestic Violence Situations*, American Behavioral Scientist, Feb. 1996, 443.

[44] Mildred Daley Pagelow, *Adult Victims of Domestic Violence*, Journal of Interpersonal Violence, March 1992, 87, 92.

[45] *Id.*

[46] Kathleen J. Ferraro, *Cops, Courts, and Women Battering, in Violence Against Women The Bloody Footprints* 165, 166-167 (P.B. Bart & E.G. Moran eds., 1993). The traditional unresponsiveness by police was indeed the context in which Congress enacted the VAWA civil rights remedy.

[47] One common rationalization offered for failing to mobilize the law on behalf of the victims of domestic violence is the value of sanctity of the home and that it is a matter of civil law. Stephen E. Brown, *Police Responses to Wife Beating: Neglect of a Crime of Violence*, Journal of Criminal Justice 277, 279 (1984).

in family disputes is still not regarded as "real police work." [48]

The ambivalence toward domestic abuse and the reluctance of the criminal justice system to interfere in "private matters" still persists today. In a 1995 survey of 123 police agencies nationwide, the study reported that police departments still "tend to regard domestic assault as a private [rather] than a criminal matter." [49] As one woman testified before the Subcommittee on Crime and Criminal Justice of the House Committee on the Judiciary "One time the police were called to our apartment by neighbors. On finding it was a husband-wife thing they told us to keep it down and went on their way." [50] Because the police still regard domestic violence as a private matter, police departments treat domestic cases differently than other cases. As Florida Assistant State Attorney and Domestic Crimes Unit chief, Margaret Rosenbaum, explained to the House Committee on the Judiciary:

> Since many officers consider domestic violence to be a private matter, something other than real crime, the failure to properly investigate the case is tolerated, and in fact, in some departments it is even encouraged.[51]

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48 David A. Ford & Mary J. Regoli, *The Preventive Impacts of Policies for Prosecuting Wife Batterers*, in Eva S. Buzawa & Carl G. Buzawa, *Domestic Violence: The Criminal Justice Response* 29 (1990).

49 Southwestern Law Enforcement Institute, *Domestic Assault Among Police: A Survey of Internal Affairs Policies*, (1995).

50 *Domestic Violence: Not Just a Family Matter: Hearing before the Subcomm. on Crime and Criminal Justice of the House Committee on the Judiciary*, 103rd Cong., 18 (1994) (testimony of Karla M. Digirolamo).

51 *Violence Against Women: Hearing before the House Comm. on the Judiciary*, 102nd Cong., 70 (1992) (testimony of Margaret Rosenbaum).

Consequently, Ms. Rosenbaum testified,

> more often than not . . . [the Domestic Crimes Unit] screens felony cases in which no detective has been assigned, no evidence impounded, no photographs taken, no area canvass done for witnesses who may have seen or heard something, and no statements attempted to be taken from the victim or the offender.[52]

Despite the enactment of the VAWA, arrests are still seen as ineffective, both in the sense that they rarely result in a successful prosecution of the offense and the sense that they do little to influence the behavior of the offender.[53] Today, the criminal justice system still places a greater importance on fostering family harmony over the protection of domestic violence victims. Thus, many domestic disturbance calls are still handled using informal methods such as informal advice or separating the disputants for the night.[54]

Although much progress has been made and standards have been established throughout police departments, many conscientious police officers feel that their efforts in confronting domestic violence and abuse crimes are wasted because even their best cases are rarely prosecuted, and when they are, judges often view them as minor "family squabbles" and fail to impose suitable sentences.[55]

In sum, a phone call to the police still is not an effective remedy to protect the civil rights of women and

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52 *Id.*

53 Jerome McKean & James E. Hendricks, Criminal Justice Planning Agency, *The Role of Crisis Intervention in the Police Response to Domestic Disturbances*, February 1997, 269, 270-271.

54 Stalans, *supra* note 43, at 484.

55 Pagelow, *supra* note 44, at 95.

victims of domestic violence. Victims of domestic violence and gender-motivated violence have explained:

> [t]he police reinforced what, through my husband's psychological abuse, I had come to believe; that my husband had every right to beat me, rape me and hurt our children. No matter what he did, no matter how many times the police were called, it seemed that he had all the rights. . . .[56]

b) ***The civil actions provided by the VAWA were necessary to overcome historically ineffective prosecutorial and judicial efforts.***

> I had a prosecutor who would scream at me and shake his finger in my face. At one time he even touched my nose and told me that if I dropped charges he was going to come after me, and if I didn't show up or if I dropped charges he was going to file charges against me. . . . I was constantly told [by the prosecutor] that 75 percent of you women drop charges. . . . The prosecutor also said that I was just doing this because I was mad at [the perpetrator] and that I was probably talking to him and sleeping with him.[57]

This Congressional testimony by another domestic violence victim, Loretta Baca, is one example of how some prosecutors have misunderstood the victim's perspective in domestic violence cases. The very notion of prosecutorial discretion recognizes the opportunity for a prosecutor's personal biases about domestic violence to affect his or her decision of whether to prosecute. Like

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[56] *Violent Crimes Against Women: Hearing before the House Comm. on the Judiciary*, 102nd Cong. 58 (1992) (testimony of Jane Doe).

[57] *Violent Crimes Against Women: Hearing before the Senate Comm. on the Judiciary*, 103rd Cong. 12 (1993) (testimony of Loretta Baca).

the police, prosecutors may assign domestic abuse cases low priority because domestic violence has not been treated with the same seriousness as stranger assaults.[58] Prosecutors may also refuse to proceed with a case based on a general assumption that abused women will not be willing to testify against their husbands, or that their statements are suspect due to enmity they feel toward their abusers.

Moreover, prosecutors enjoy wide discretion in charging crimes. To the extent a domestic violence incident does in fact result in criminal charges, the batterer will more likely be charged with a lesser offense. Given the patterns associated with domestic violence, a conviction for a misdemeanor domestic violence crime most often belies the frequency and severity of the acts. Even if a perpetrator of more serious acts of domestic violence is charged commensurate with the crime, charges are frequently plead down to misdemeanors.[59]

Too many judges are also willing to dismiss domestic violence. Judges have sometimes refused to intervene, treated the situation lightly, or acted as if the batterer and the victim were equally responsible, thus sending signals of legitimization to the abuser or blame to the victim. As one state court judge concluded about the batterer and victim in a domestic violence dispute:

> Yes, he may have beaten her, but nagging and a sharp tongue can be just as bad. Maybe she used her sharp tongue so often that she provoked him to hit her.[60]

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[58] *Developments in the Law—Legal Responses to Domestic Violence, supra* note 41, at 1555 (spousal abuse complaints are assigned low rank by prosecutors).

[59] Judy Mann, *When an Abuser is Armed*, The Washington Post, May 16, 1997, at E03.

[60] *Developments in the Law—Legal Responses to Domestic Violence, supra* note 41, at 1556.

A state court judges' personal biases about domestic violence may effect his or her ability to proceed fairly in such cases.

Domestic violence or abuse offenses are therefore treated more leniently at all stages of the legal proceedings within the states' criminal justice system. The closer the relationship between the victim and the offender, the less likely the police are to make an arrest, the less likely the prosecutor is to bring formal charges, the less likely a conviction or prison will result, the shorter prison sentences are likely to be, and the less likely a sentence of capital punishment will be handed down.[61]

In sum, inadequate state laws and inadequate enforcement exist throughout the states' criminal justice systems. Victims of domestic violence and gender-motivated violence may have little, if no, control in criminal proceedings.[62] The civil actions provided by the VAWA allow those harmed to control the legal action. Those groups traditionally powerless in the legal and criminal justice system now have at least limited power to control the process and to place themselves, not the state, against their attackers.[63] The VAWA provides victims of domestic violence greater protection and recourse to stop the violence and seek abuser accountability.[64]

3. *The Protections Provided By State Civil Protection Orders Were Inadequate to Protect Battered Women.*

Because traditional civil and criminal remedies alone often are inadequate, protection orders play a vital role

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61 Leonore M.J. Simon, *A Therapeutic Jurisprudence Approach to the Legal Processing of Domestic Violence Cases*, Psychology, Public Policy and Law 43, 63 (1995).

62 *Violence Against Women: Law and Litigation*, § 2:1 (David Frazee et al, eds., 1998).

63 *Id.*

64 *Id.*

in protecting victims of domestic violence.[65] In one study, 80 percent of women with a temporary protection order said the order was somewhat or very helpful in sending the batterer a message that his actions were wrong.[66] Although the entry of a protection order did not appear to deter most types of abuse, it did significantly reduce the likelihood of acts of psychological abuse such as preventing the victim from leaving her home, going to work, using a car or telephone, and stalking and harassing behaviors.[67]

Unfortunately, however, state remedies such as restraining orders still are inadequate to protect the victims of domestic violence and gender-motivated violence. To some abusive men, a restraining order is simply a piece of paper. In one study, nearly half the victims who obtained a protection order were reabused within two years.[68] Of those women who obtained protection orders, sixty percent reported violations within one year with most violations leading to arrest occurring within ninety days of entry of the order. Even after obtaining protection orders, battered women are often subjected to repeated abuse, harassment,

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65 The fifty state legislatures and the District of Columbia have responded to the domestic violence crisis and have enacted civil protection order statutes that afford relief to adult and child victims of domestic violence. See, *e.g.*, Ala. Code § 30-5-1, *et seq.*; Alaska Stat. § 25.35.010, *et seq.*; Ariz. Rev. Stat. Ann. §§ 13-3601, 3602; Ark Stat. Ann. § 9-15-101, *et seq.*; Cal. Civ. Proc. Code § 545, *et seq.*; Colo. Rev. Stat. § 14-4-101, *et seq.* More recently, forty-nine states and the District of Columbia have enacted anti-"stalking" laws, criminalizing harassment that threatens death or serious injury. See, *e.g.*, Ky. Rev. Stat. Ann. § 508.140 (Baldwin 1995); Okla. Stat. Ann. tit 21, § 1173 (West Supp 1995); Tenn. Code Ann. § 39-17-315 (West Supp. 1995).

66 *Do Arrests and Restraining Orders Work?* 218 (Eva S. Buzawa & Carl G. Buzawa eds., 1996).

67 *Id.* at 228-29.

68 *Id.*

threats, and murder by men whom the courts had ordered to stay away. In one study, over sixty percent of women reported acts of abuse after the entry of a protection order, and approximately thirty percent reported acts of severe violence.[69] In a 1995 study, seventeen percent of protection order defendants were arraigned for a violation of the order within one year but only six percent were convicted of violating the order.[70]

CONCLUSION

As the voluminous legislative record attests, and the words of the victims of domestic violence corroborate, Congress rationally concluded that the civil remedy of the VAWA was necessary. As Congress was authorized to enact the VAWA under both the Commerce Clause and the 5th section of the 14th Amendment, the *en banc* Fourth Circuit of Appeals should be REVERSED.

Respectfully submitted,[71]

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[69] *Id.* at 223.

[70] Office of the Commissioner of Probation, Massachusetts Trial Court, *Tragedies of Domestic Violence: A Qualitative Analysis of Civil Restraining Orders in Massachusetts* 15-17 (1995).

[71] Counsel would also like to thank Thomas Lent, Lisa Frye, Dawn Marron, and Roberta Valente for their assistance with this brief.

APPENDIX

APPENDIX

INTEREST OF *AMICI CURIAE*

The following organizations submit this brief as *Amici curiae* in support of Petitioner:

National Network to End Domestic Violence

The *National Network to End Domestic Violence* ("NNEDV") is a not-for-profit organization incorporated in the District of Columbia in 1995. NNEDV is a network of state domestic violence coalitions, representing over 2,000 member programs nationally. NNEDV's mission is to end domestic violence through public policy and education.

National Network to End Domestic Violence Fund

The *National Network to End Domestic Violence Fund* ("NNEDV Fund") is a nonprofit organization founded in 1996 for the purposes of providing technical assistance, training and public education to advocates, professionals and individuals who encounter battered women in their work and communities. The NNEDV Fund has provided advice and expertise on domestic violence issues affecting battered women and their children to judges, attorneys, educators and state and local advocates as well as child support, child welfare, justice system personnel, and others working to end domestic violence.

Floriad Coalition Against Domestic Violence

The *Florida Coalition Against Domestic Violence* ("FCADV") is a private not-for-profit organization incorporated in Florida in 1977. Its mission is to create a violence free world by empowering women and children through the elimination of personal and institutional violence and oppression against all people. The FCADV

works to end domestic violence through public awareness, education, training, and technical assistance to service providers. Our members include Florida's 38 certified domestic violence centers, associations, and individuals.

Hawaii State Coalition Against Domestic Violence

The *Hawaii State Coalition Against Domestic Violence* ("HSCADV"), a private not-for-profit organization, is a statewide coalition of domestic violence programs working collaboratively to affect public policy and establish a coordinated and consistent response to protect the safety and welfare of battered women. Its goals include promotion of public recognition of domestic violence as a pervasive societal problem, detrimental to all members of society, rather than a personal problem and the obliteration of racism, sexism, and homophobia that contribute to domestic violence. The HSCADV has sixteen member programs.

Iowa Coalition Against Domestic Violence

The *Iowa Coalition Against Domestic Violence* ("ICADV") is a non-profit organization, incorporated in the state of Iowa in 1985. ICADV provides educational and technical assistance to the domestic violence programs across Iowa, and acts on a statewide level to promote public policy and legislative issues on behalf of battered women and their children. ICADV's purpose is to eliminate personal and institutional violence against women through support to programs providing safety and services to battered women and their children. ICADV recognizes that unequal power contributes to violence against women. Therefore, ICADV advocates social change, legal and judicial reform, education, and the end to all oppression.

Michigan Coalition Against Domestic and Sexual Violence

The Michigan Coalition Against Domestic and Sexual Violence ("MCADSV") is a statewide membership organization incorporated in 1978. The members represent a network of service providers of comprehensive services to survivors of domestic and sexual violence and allied organizations and individuals. The MCADSV aims to ensure that quality services are provided to victims of sexual and domestic violence. MCADSV advocates for the prevention of domestic and sexual violence through education, acting as an information clearinghouse, and providing technical assistance, training and public policy advocacy.

New Hampshire Coalition Against Domestic and Sexual Violence

The *New Hampshire Coalition Against Domestic and Sexual Violence* ("NHCADSV") is a not-for-profit organization incorporated in the State of New Hampshire for the purpose of coordinating services and advocacy on behalf of the victims of domestic and sexual violence and their minor children. NHCADSV is an organization of domestic violence and sexual assault programs. For over twenty years, NHCADSV has provided training and technical assistance to domestic violence programs, the bar, the courts and law enforcement agencies on issues of domestic violence and sexual assault.

New Jersey Coalition for Battered Women

The *New Jersey Coalition for Battered Women* ("NJCBW") is a statewide coalition of domestic violence service programs and concerned individuals whose purpose and mission is to end violence in the lives of women. Incorporated in 1979, NJCBW is a private, non-profit corporation whose members include twenty-three domestic violence programs in New Jersey. NJCBW advocates for

battered women with state level governmental and private agencies, the state legislature, judiciary and governor to support legislation and policies that will increase the safety and options of victims of domestic violence. It also provides information, resources, technical assistance and training to domestic violence programs, the public and those agencies, organizations and individuals involved with New Jersey's response to domestic violence.

NJCBW believes that Congress acted within the scope of its Commerce Clause authority when it created a private right of action for victims of gender-motivated violence, based on extensively documented findings that discriminatory violence creates significant barriers to participation by women in interstate commerce. NJCBW also believes the enactment of the civil rights remedy was a permissible exercise of Congress' authority of Congress under U.S. Const. Amend. XIV, 5.

New York State Coalition Against Domestic Violence

The *New York State Coalition Against Domestic Violence* ("NYSCADV") is a non-profit membership organization. NYSCADV members include shelters, safe home projects, advocacy programs, and counseling projects, as well as concerned individuals who share the goal and philosophy of providing services to battered women and their children and eradicating family violence through advocacy, education, public awareness and program development. Since its inception in 1981, the NYSCADV has been the driving force behind the development of hundreds of programs providing services to abused women and their children.

North Dakota Council on Abused Women's Services

The *North Dakota Council on Abused Women's Services* ("NDCAWS") is a non-profit corporation incorporated in North Dakota in 1980. NDCAWS is a network of twenty community based domestic violence centers. Its mission is to support the provision of high quality services to victims through training, technical assistance, public policy discussions and public education campaigns.

Pennsylvania Coalition Against Domestic Violence

The Pennsylvania Coalition Against Domestic Violence, Inc. ("PCADV") is a not-for-profit organization incorporated in the Commonwealth of Pennsylvania for the purpose of providing services and advocacy on behalf of victims of domestic violence and their minor children. PCADV is a membership organization of sixty-four shelters, hotlines, counseling programs, safe home networks, legal advocacy projects, and transitional housing projects for battered women and their dependent children in the Commonwealth. For over twenty years, PCADV has provided training and technical assistance to domestic violence programs, attorneys, the courts, and law enforcement agencies on issues of domestic violence.

PCADV joins the brief of amicus curiae to assist the Supreme Court in its consideration of the critical issue of battered women's access to economic restoration through legal remedies.

Rhode Island Coalition Against Domestic Violence

The *Rhode Island Coalition Against Domestic Violence* ("RICADV") is a non-profit organization, incorporated in the state of Rhode Island and Providence Plantations in 1979 to assist and support Rhode Island's six shelter programs for victims of domestic abuse. RICADV has taken the lead in policy and program development on behalf of battered women for nearly twenty years. RICADV is active in implementing the provisions of the Violence Against Women Act in Rhode Island, and in national

advocacy activities relating to the law. RICADV serves as a resource for its six member agencies, providing training, technical assistance, statewide planning and needs assessment research, and dissemination of resources.

Vermont Network Against Domestic Violence and Sexual Assault

The *Vermont Network Against Domestic Violence and Sexual Assault* ("VNADVSA") is a not-for-profit organization incorporated in Vermont in 1986. VNADVSA is a network of Vermont domestic and sexual violence programs, providing services, advocacy and support to victims of domestic and sexual violence.

Virginians Against Domestic Violence

Virginians Against Domestic Violence ("VADV") is a not-for-profit organization incorporated in the Commonwealth of Virginia in 1981. VADV is a network of local domestic violence programs, other interested organizations, and individuals committed to ending domestic violence. VADV works to provide support and training to local domestic violence programs and allied professionals, monitor and guide the development of public policy, and educate the general public about domestic violence and its effects. VADV's mission is to work toward the elimination of domestic violence in the Commonwealth.

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No. 99-5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

CHRISTY BRZONKALA

Petitioner,

v.

ANTONIO J. MORRISON, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

MOTION TO FOR LEAVE TO FILE BRIEF AND AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE PETITIONER

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Pursuant to Rule 37.2 of the Rules of this Court, the Association of Trial Lawyers of America ("ATLA") respectfully moves this Court for leave to file the accompanying brief as amicus curiae in support of the Petitioner. Petitioner and Respondent Morrison have granted consent to the filing of this brief. Respondent Crawford has not.

This case is of great importance to ATLA, its members and their clients.

ATLA is a voluntary national bar association whose approximately 50,000 trial lawyers primarily represent injured plaintiffs in civil actions. Among those plaintiffs are

victims of gender-motivated violence seeking compensation and other relief under 42 U.S.C. § 13981, the civil remedy provided in the Violence Against Women Act of 1993. ATLA and its members therefore have a significant interest in this Court's resolution of the issue of the constitutionality of that statutory remedy.

ATLA also believes that its contribution through this brief will assist this court. Since 1946, ATLA and its members have been active participants in the development of tort remedies at common law and by statute. That development has shown that tort remedies serve an important function as a supplement to criminal penalties in areas where criminal law enforcement and regulation have been inadequate. In ATLA's view, the federal civil remedy in § 13981 serves a similar corrective purpose. It therefore is within the scope of Congress' authority to enforce the rights guaranteed by the Fourteenth Amendment.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

No. 99-5

CHRISTY BRZONKALA

Petitioner,

v.

ANTONIO J. MORRISON, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE PETITIONER

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Association of Trial Lawyers of America ("ATLA") respectfully submits this brief as amicus curiae in this case. Letters from parties granting consent and a motion for leave to file this brief have been filed with this Court.[1]

ATLA is a voluntary national bar association whose approximately 50,000 trial lawyers primarily represent

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[1] Pursuant to Rule 37.6, Amicus discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than amicus curiae, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

injured plaintiffs in civil actions. Among those plaintiffs are victims of gender-motivated violence seeking compensation and other relief under 42 U.S.C. § 13981, the civil remedy provided in the Violence Against Women Act of 1993. ATLA and its members therefore have a significant interest in this Court's resolution of the issue of the constitutionality of that statutory remedy.

ATLA also believes that its contribution through this brief will assist this court. Since 1946, ATLA and its members have been active participants in the development of tort remedies at common law and by statute. That development has shown that tort remedies serve an important function as a supplement to criminal penalties in areas where criminal law enforcement and regulation have been inadequate. In ATLA's view, the federal civil remedy in § 13981 serves a similar corrective purpose. It therefore is within the scope of Congress' authority to enforce the rights guaranteed by the Fourteenth Amendment.

SUMMARY OF THE ARGUMENT

1. Congress enacted 42 U.S.C. § 13981, providing a civil remedy against the perpetrators of gender-motivated violence following extensive hearings. Congress found that state justice systems were not enforcing legal protections against violence that predominantly affects women, compared to other crimes of violence. As part of its program to enforce equal protection under the law for women, Congress provided a civil remedy under which victims of gender-motivated violence can obtain compensatory and punitive damages and other relief.

This civil remedy falls well within the scope of the power conferred on Congress by § 5 of the Fourteenth Amendment to enact appropriate legislation to enforce the rights guaranteed by the amendment. The fact that the remedy permits an action against private persons does not place in outside the limits of Congress' authority. Although

the prohibitions in § 1 extend only to state action, the enforcement power given to Congress in § 5 is not.

2. Congress acts within the proper scope of its authority under § 5 when there is congruence and proportionality between the deprivation of rights identified by Congress and the means Congress employs to remedy that harm. Failure on the part of states to provide equal protection of the law on the basis of gender is clearly a deprivation of rights under the Fourteenth Amendment. Congress made extensive and detailed findings that bias in state law, police, prosecutors and courts result in inadequate enforcement for crimes that predominantly affect women.

The means Congress has chosen to remedy this inadequacy constitutes only a slight intrusion into state autonomy. The remedy extends only to violent conduct that is already punishable under state law. It does not overturn any state criminal law or tort remedy. And Congress took care to avoid intrusion into matters of particular state interest, such as domestic relations.

3. Providing a civil remedy represents a reasonable step toward correcting inadequate enforcement of criminal law with respect to gender-motivated crimes. It has historically been a function of tort remedies, including punitive damages, to serve as a corrective supplement to criminal penalties, particularly in areas in which criminal law enforcement has been inadequate.

ARGUMENT

I. THE CIVIL REMEDY AGAINST PRIVATE PERSONS IS WITHIN CONGRESSIONAL POWER TO ENFORCE THE FOURTEENTH AMENDMENT GUARANTEE OF EQUAL PROTECTION OF THE LAW

A. Congress Enacted the Civil Remedy To Enforce the Civil Right of Women to Equal Protection of the Laws Guaranteed by the Fourteenth Amendment.

Congress enacted the Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (codified in various sections of 18 U.S.C. and 42 U.S.C.), following four years of extensive hearings. Congress found gender-motivated violence to be widespread in America. Equally dismaying, and perhaps more critical, Congress found that state criminal and civil justice systems did not adequately protect women against gender-based violence. To correct what it determined to be a failure among the states to carry out their obligation under the Fourteenth Amendment to provide equal protection under the law, Congress enacted an extensive program of corrective measures. Part of that effort is 42 U.S.C. § 13981, which grants the victim a civil remedy against the perpetrator of gender-motivated violence, permitting recovery of compensatory damages, punitive damages, injunctive and other relief.[2]

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[2] 42 U.S.C. § 13981:

(a) Purpose

Pursuant to the affirmative power of Congress to enact this part under section 5 of the Fourteenth Amendment to the Constitution, as well as under section 8 of Article I of the Constitution, it is the purpose of this part to protect the civil rights of victims of gender motivated violence and to promote public safety, health, and activities affecting interstate commerce by establishing a Federal civil rights cause of action for victims of crimes of violence motivated by gender.

(b) Right to be free from crimes of violence

Congress did not rely solely, or even primarily, on its ›mmerce Clause power in enacting the statute. Congress /oked "the affirmative power of Congress to enact this part der section 5 of the Fourteenth Amendment to the ›nstitution, as well as under section 8 of Article I of the ›nstitution." 42 U.S.C. § 13981(a). Indeed, Congress' goal enacting the civil remedy, expressed throughout an :tensive legislative record, was to place gender-motivated .olence on a par with traditional civil rights violations. See,

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.ll persons within the United States shall have the right to be free from rimes of violence motivated by gender (as defined in subsection (d) of ıis section).

c) Cause of action

\ person (including a person who acts under color of any statute, ›rdinance, regulation, custom, or usage of any State) who commits a :rime of violence motivated by gender and thus deprives another of the :ight declared in subsection (b) of this section shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.

(d) Definitions

For purposes of this section--

(1) the term "crime of violence motivated by gender" means a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender; and

(2) the term "crime of violence" means--

(A) an act or series of acts that would constitute a felony against the person or that would constitute a felony against property if the conduct presents a serious risk of physical injury to another, and that would come within the meaning of State or Federal offenses described in section 16 of Title 18, whether or not those acts have actually resulted in criminal charges, prosecution, or conviction and whether or not those acts were committed in the special maritime, territorial, or prison jurisdiction of the United States; and

(B) includes an act or series of acts that would constitute a felony described in subparagraph (A) but for the relationship between the person who takes such action and the individual against whom such action is taken.

e.g., Sen. Rep. 103-138, 103d Cong., 1st Sess. 48-49 (1993)[hereinafter "Senate Report 1993"].

The Fourteenth Amendment states, in part: "No state shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. Further, "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

In ATLA's view, the Act was clearly a valid exercise of Congress' broad enforcement power under Section 5. For that reason, this Court need not determine whether the Act was also within Congress' authority to "regulate Commerce . . . among the several states." U.S. Const. art. I, § 8, cl. 3.

The lower court portrays its decision as dictated by "the principles of limited federal government upon which this Nation is founded" and disparages as "modern" and "expedient" any inroads by the national government on state autonomy. *Brzonkala v. Virginia Polytechnic Inst.*, 169 F.3d 820, 826 (4th Cir. 1999)(en banc). ATLA suggests that those who crafted the Constitution to replace the failed Articles of Confederation did not establish a national government that would be powerless to enforce federal rights in the face of inaction by the States.

Moreover, the appropriate historical framework is the period following the Civil War, a period of overriding concern with the "unwillingness or inability of the state governments to enforce their own laws against those violating the civil rights of others." *District of Columbia v. Carter*, 409 U.S. 418, 426 (1973); *see also, Monroe v. Pape*, 365 U.S. 167, 175 (1961). It is hardly a "modern" notion that the Thirteenth and Fourteenth Amendments "were intended to be, what they really are, limitations of the power of the States and enlargements of the power of Congress." *Ex parte Virginia*, 100 U.S. 339, 345 (1880).

B. Congress' Authority to Enforce Fourteenth Amendment Rights Is Not Limited to Regulation of State Actors.

The lower court's decision that Congress lacked the authority to provide a civil remedy against the perpetrators of gender-motivated violence is premised almost entirely on the proposition that "Congress may not regulate purely private conduct pursuant to its Fourteenth Amendment enforcement power." 169 F.3d at 862.

The lower court canvasses the precedents of this Court for the unexceptional proposition that "'[b]ecause the [Fourteenth] Amendment is directed at the States, it can be violated only by conduct that may be fairly characterized as 'state action,'" 169 F.3d at 826, quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 924 (1982). However, this Court has never held that when Congress perceives such a violation its remedy must be limited to direct regulation of the state actors themselves.

ATLA contends that Congress' enforcement power is not so confined. The prohibitions of the Fourteenth Amendment encompass only action "fairly attributable to the state," *Lugar* at 937. But the text of Section 5 places no equivalent restriction on the means Congress may choose to remedy state violations. Indeed, this Court has broadly described the Enforcement Clause as "a positive grant of legislative power." *City of Boerne v. Flores*, 521 U.S. 507, 516 (1997), quoting *Katzenbach v. Morgan,* 384 U.S. 641, 651 (1966). Limiting congressional remedies to prohibiting conduct already proscribed in Section 1 would render the enforcement powers conferred by this broadly drafted constitutional provision largely superfluous. *See* Archibald Cox, *The Role of Congress in Constitutional Determinations*, 40 U. Cin. L. Rev. 199, 257-59 (1971) (limiting Congress' Section 5 powers to scope of Section 1 would defeat the purpose of the enforcement clause and would merely enable Congress to replicate what judiciary is bound to do).

The Court in the Civil Rights Cases, 109 U.S. 3 (1883), clearly understood the enforcement provision to confer authority on Congress beyond legislating against action already prohibited prohibition in section 1. The Court explained that the Fourteenth Amendment:

> nullifies and makes void all state legislation, and state action of every kind, which . . . denies to any [citizen] the equal protection of the laws. It not only does this, but, . . . the last section of the amendment invests congress with power to . . . adopt appropriate legislation for *correcting the effects of such prohibited state law and state acts*, and thus to render them effectually null, void, and innocuous."

109 U.S. at 11 (emphasis added). Surely a federal remedy to correct the effects of state failure to enforce criminal penalties for crimes predominantly affecting women falls within that description.

The fact that the violent acts do not themselves violate the Fourteenth Amendment because they were committed by private persons does not place them beyond the reach of Congress' enforcement power. In *District of Columbia v. Carter*, 409 U.S. 418 (1973), a unanimous Court ruled that the judicially enforced prohibitions of Section 1 do not extend to private conduct. However, the Court added: "This is not to say, of course, that Congress may not proscribe purely private conduct under §5 of the Fourteenth Amendment." *Id.* at 424 n.8, citing *United States v. Guest*, 383 U.S. 745, 762 (1966) (Clark, J., concurring); id., at 782-84 (Brennan, J., concurring and dissenting).

Recently, and on several occasions, this Court has restated this broad view of Congress' authority under § 5:

> Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes

> into legislative spheres of autonomy previously reserved to the States.

Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 119 S.Ct. 2199, 2206 (1999); *Lopez v. Monterey County,* 119 S.Ct. 693, 703 (1999); *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997).

The power of Congress under § 5 is not unbounded, of course. But its scope is not defined by the distinction between public and private action. Rather, this Court has stated that Congress acts within its § 5 authority where there is "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Boerne,* 521 U.S. at 518.

ATLA submits that 42 U.S.C. §13981 falls well within the scope of Congress' authority.

II. THE CIVIL REMEDY REFLECTS A CONGRUENCE AND PROPORTIONALITY BETWEEN THE HARM IDENTIFIED BY CONGRESS HARM AND MEANS EMPLOYED TO REMEDY IT

The Court in *Boerne* explained the limits on Congress' authority under § 5 of the Fourteenth Amendment: "Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation." *Id.* at 519. That power is, ultimately, the Court's. *Id.* at 536. The Court explained that, while this distinction

> is not easy to discern, and Congress must have wide latitude in determining where it lies, . . . [t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect.

Id. at 519-20.

The Court applied this standard in a two-step fashion, looking first to whether Congress identified significant deprivations of rights protected by the Fourteenth Amendment, and then to whether the intrusion into state affairs is proportionate to the harm. *See Florida Prepaid,* 119 S. Ct. at 2207.

With respect to the Religious Freedom Restoration Act of 1993, the Court in *Boerne* the Court found the legislative record lacked examples of religious persecution or laws enacted out of religious bigotry, quoting the comment of one congressional witness that "deliberate persecution is not the usual problem in this country." 521 U.S. at 530. Second, the Court found that the statute resulted in sweeping intrusions at all levels of government, displacing laws, prohibiting official actions and imposing heavy litigation burdens on the states. The Court concluded that this interference with state governance was so out of proportion to the harm that the statute appeared "to attempt a substantive change in constitutional protections." *Id.* at 532.

By contrast, ATLA suggests, the substantial evidence of state inability to provide equal protection for women documented in the legislative record, weighed against the civil remedy's minimal intrusion into state governance, demonstrates the constitutionality of 42 U.S.C. §13981.

A. Congress Made Extensive Findings of Widespread Inadequacy of State Protection Against Gender-Motivated Violence

The harm identified by Congress was widespread inadequacy of state enforcement of penalties and remedies for those acts of violence that predominantly affect women. The House Conference Report stated that "bias and discrimination in the criminal justice system often deprives victims of crimes of violence motivated by gender of equal protection of the laws and the redress to which they are

entitled. H.R. Conf. Rep. No. 103-711 (1993), at 385. The Senate Report elaborates:

> Women often face barriers of law, of practice, and of prejudice not suffered by other victims of discrimination. Traditional State law sources of protection have proved to be difficult avenues of redress for some of the most serious crimes against women. Study after study has concluded that crimes disproportionately affecting women are often treated less seriously than crimes affecting men. [C]ollectively, these reports provide overwhelming evidence that gender bias permeates the court system and that women are most often its victims.

Senate Report 1993, at 49.

The right to equal enforcement of the law regardless of gender is clearly within the rights guaranteed by the Fourteenth amendment. Since 1971 "this Court consistently has subjected gender-based classifications to heightened scrutiny in recognition of the real danger that government policies that professedly are based on reasonable considerations in fact may be reflective of 'archaic and overbroad' generalizations about gender or based on or based on 'outdated misconceptions.'" *J.E.B. v. Alabama ex rel. T. B.*, 511 U.S. 127, 135 (1994) (citations omitted).

During the past 25 years, with few exceptions, the Court has invalidated nearly every classification based on gender presented to it. The "core instruction of this Court's pathmarking decisions" has been that those "who seek to defend gender-based government action must demonstrate an exceedingly persuasive justification for that action. *United States v. Virginia*, 518 U.S. 515, n.4 (1996). Writing for the Court, Justice Ginsburg added, [t]oday's skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history. As a plurality of this Court acknowledged a generation ago, 'our Nation has had a long

and unfortunate history of sex discrimination.' *Id.* at 531, citing *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973).

The lower court however, disputed the congressional findings:

> If anything, the hearings and reports on section 13981 bear out that the States and state law enforcement officials . . . have undertaken the most fervent, and sincere efforts to assist victims of rape and domestic violence and that despite such efforts subtle prejudices and stereotypes among society at large continue to prevent women from filing criminal complaints, bringing suit, and otherwise obtaining vindication through the legal system.

169 F.3d at 885 (internal quotations and citations omitted).

Even allowing for the style of hyperbole that the opinion below appears to favor, this characterization of the legislative record appears to amicus as bizarre.

In fact, Congress made detailed findings concerning "existing bias and discrimination in the criminal justice system." H.R. Conf. Rep. No. 103-711, at 385. Petitioner has presented a detailed examination of the legislative record and ATLA will not burden the Court with its repetition. Of particular significance, however, is the fact that Congress found specific discrimination in many areas of state justice systems.

These include state criminal laws, such as the marital rape exception which bars prosecution for rape of a spouse or intimate partner or, in some states, imposes reduced penalties compared with nonmarital rape. See Senate Report 1993, at 42 (1993); Sen. Rep. No. 102-197, 102d Cong., 1st Sess., at 45 n.50 (1991). Even where these laws are modernly phrased in gender-neutral terms, they obviously disadvantage women in almost all instances.

Congress also found examples of unequal treatment in the practices and policies of police, prosecutors and the

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courts. Senate Report (1993) at 42-47. Congress concluded that:

> Women often face barriers of law, of practice, and of prejudice not suffered by other victims of discrimination.
>
> Traditional State law sources of protection have proved to be difficult avenues of redress for some of the most serious crimes against women. Study after study has concluded that crimes disproportionately affecting women are often treated less seriously than crimes affecting men. Collectively, these reports provide overwhelming evidence that gender bias permeates the court system and that women are most often its victims.

Senate Report . No. 103-138 (1993) at 49.

ATLA suggests that the conclusions of Judge Shanahan of the District of Nebraska represent a more accurate characterization of the congressional findings:

> The legislative history surrounding VAWA evidences a congressional perception that states are failing to protect the equal rights of women from the immense and invidious problem of gender based violence. Congress carefully documented the problem of state inaction and made extensive findings regarding the states' inadequacies in addressing the problem of violence against women.

Timm v. Delong, No. 8:98CV43 (D. Neb. June 22, 1998).

Significantly, support for Congress' findings also came from the states. The studies referred to above included reports prepared by gender bias task forces in 17 states. Senate Report (1993) at 49. Congress also received a letter signed by the attorneys general of 38 states stating "the current system for dealing with violence against women is inadequate" and urging the creation "of a federal civil rights remedy for the victims of gender-based crimes." *See* Crimes of Violence Motivated by Gender: Hearing Before the

Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 103d Cong. 34-36 (1993) (Letter from State Attorneys General).

B. The Civil Remedy is Not Out of Proportion to the Harm to be Remedied

The second step undertaken by the *Boerne* Court was to ask whether the remedy chosen by Congress was congruent with and in proportion to the harm. In *Boerne*, the Court was faced with a statute that cut a broad swath through state government, overturning numerous state laws and imposing extensive litigation costs on the states.

By contrast, the civil remedy set forth in 42 U.S.C. § 13981 overturns no state laws. It does not command the states to repeal the marital rape exception, spousal immunity doctrine or any of the formal legal barriers that disproportionately disadvantage female victims of gender-motivated violence. Nor does the statute command the executive officers of the states to alter their prosecutorial policies or police practices to treat crimes that tend to victimize women on a par with other criminal activity. The section merely allows the victims of crime to seek compensatory and other damages from the perpetrators in a private civil lawsuit.

Nor did Congress attempt to expand the type of conduct the states are obliged to protect against. Section 13981 provides a remedy only for violence that is already punishable as a felony under state law. Congress specifically defines a "crime of violence," as "an act or series of acts that would constitute a felony against the person or that would constitute a felony against property if the conduct presents a serious risk of physical injury to another, and that would come within the meaning of State or Federal offenses described in section 16 of Title 18." 42 U.S.C. § 13981(d)(2).

The lower court points out that this provision includes offenses constituting federal felonies when committed within

the federal jurisdiction, such as murder, rape, assault and kidnapping, other violence punishable if committed on federal lands, 169 F.3 at 842. Obviously, this provision does not seek to control conduct that is not otherwise punishable under state law.

The lower court relied heavily on this Court's statement that "[w]hen Congress criminalizes conduct already denounced as criminal by the States, it effects a 'change in the sensitive relation between federal and state criminal jurisdiction.'" 169 F.3d at 840, quoting *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) The civil remedy contained in 42 U.S.C. § 13981, however, is not a criminal statute. It displaces no state criminal law and does not criminalize any conduct.

Nor does the civil remedy for gender-motivated violence impose new or additional punishment for conduct that, by definition, is already regulated by the state. Virtually all violent conduct that inflicts or threatens physical harm to a person that would be punishable as a felony also constitutes an intentional tort under state law. Plaintiffs are free to elect a remedy under state law or federal law -- though they are not entitled to double recovery for the same injury. The federal civil remedy merely reinforces the state's own policy, evidenced in the law of torts, against tortious injury.

Nor does the statute directly supersede or impermissibly infringe on the states' authority to regulate family law matters. Congress expressly provided that the statute confers no "jurisdiction over any State law claim seeking the establishment of a divorce, alimony, equitable distribution of marital property, or child custody decree." 42 U.S.C. § 13981(e)(4).

Congress clearly intended this congruence between state and federal regulation to provide assurance that federal rights would be protected. "Each and every one of the existing civil rights laws covers an area in which some

aspects are also covered by State laws. What State laws do not provide, and cannot provide by their very nature, is a national antidiscrimination standard." Sen. Rep. No. 102-197 (1991) at 49.

In sum, Congress tread carefully in enacting 42 U.S.C. § 13981 to avoid intrusion into state areas of responsibility.

III. CIVIL REMEDY IS A REASONABLE MEANS TO REMEDY INADEQUACY OF STATE CRIMINAL AND CIVIL ACTIONS IN PROTECTING FEDERAL RIGHT TO EQUAL PROTECTION UNDER THE LAW.

A. Congress' Choice of Remedies to Enforce Equal Protection for Women Is To Be Accorded Deference.

The lower court, having remonstrated against federal action that might impact the states in even the most indirect fashion appears to state that the only appropriate course of enforcement for Congress is to overturn state laws and other barriers to equal protection for women outright. See 169 F.2d at 885.

ATLA submits that the path chosen by Congress, to provide a civil remedy to victims of gender-motivated violence without broad and sweeping intrusion into state government, represents a reasonable means for remedying the harm of inadequate enforcement of federal rights by the states. Regardless of whether the court would agree that this remedy is the optimum policy Congress could devise, it is sufficient under the Fourteenth Amendment that the court is "able to perceive a basis upon which the Congress might resolve the conflict as it did." *Katzenbach v. Morgan*, 384 U.S. 641, 653 (1966). This deferential standard is consistent with the "rational basis" review of congress' enforcement efforts under other constitutional authority. See *City of Rome v. United States*, 446 U.S. 156, 177 (1980) (Fifteenth Amendment); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409,

440 (1968) (Thirteenth Amendment); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) (Commerce Clause); *Katzenbach v. McClung,* 379 U.S. 294, 309 (1964)(Commerce Clause).

B. Civil Remedies Serve as a Corrective Supplement to Remedy Inadequate Enforcement of Criminal Penalties.

The court below expresses disbelief that Congress meant what it said regarding the purpose of the civil remedy.

> That section 13981 provides a remedy only against private individuals who commit violent crimes is significant, and perhaps dispositive, evidence that section 13981 does not truly aim at correcting unequal and unconstitutional enforcement of the laws by the States, but aims instead only to remedy or deter the underlying acts of violence to which that liability attaches

The court holds an unduly narrow view of the means Congress may employ under § 5. As early as the Civil Rights Cases, 109 U.S. 3 (1883), this Court understood that Congress had not only the authority to ban discrimination by the states, but also to correct its effects:

> [T]he last section of the amendment invests congress with power to . . . adopt appropriate legislation for *correcting the effects of such prohibited state law and state acts*, and thus to render them effectually null, void, and innocuous."

109 U.S. at 11 (emphasis added). By providing an alternative federal remedy, 42 U.S.C. § 13981 takes a step toward nullifying the effects of state barriers to legal recourse.

The fact is that civil tort remedies have long served as a supplement to state criminal penalties, regularly applied by state courts as a necessary corrective measure in areas where criminal law enforcement is lax or inadequate. See Charles McCormick, *Some Phases of the Doctrine of Exemplary Damages*, 8 N.C. L. Rev. 129, 130 (1929-30)(punitive

damages serve purpose of deterring and punishing conduct that is criminally punishable, but which as practical matter, prosecutors tend to ignore); Samuel Freifield, *The Rationale of Punitive Damages,* 1 Ohio St. L.J. 5, 7 (1935) (the common law origin of punitive damages was to supplement the criminal law as a form of public outrage at conduct otherwise undeterred by the criminal law); Clarence Morris, *Punitive Damages in Tort Cases,* 44 Harv. L. Rev. 1173, 1178 (1931) (tort plaintiffs may succeed in vindicating their own rights where prosecutors do not share the same goals).

As one state court has stated this tort remedy:

> tends to elevate the jury as a responsible instrument of government, discourages private reprisals, restrains the strong, influential, and unscrupulous, vindicates the right of the weak, and encourages recourse to, and confidence in, the courts of law by those wronged or oppressed by acts or practices not cognizable in, or not sufficiently punished, by the criminal law.

Luther v. Shaw, 157 Wis. 234, 238 (1914).

See also, *Grimshaw v. Ford Motor Co.*, 119 Cal.App.3d 757, 820, 174 Cal.Rptr. 348, 389 (1981) ("It is precisely because monetary penalties under government regulations prescribing business standards or the criminal law are so inadequate and ineffective as deterrents against a manufacturer and distributor of mass produced defective products that punitive damages must be of sufficient amount to discourage such practices); *Kelsay v. Motorola, Inc.*, 74 Ill.2d 172, 186, 384 N.E.2d 353, 359 (1979) (where criminal sanctions "would do little to discourage the practice of retaliatory discharge," of workers, punitive damages are appropriate).

In the view of the lower court, "the victim's ability to obtain some small measure of justice through federal damages suits against the rapist would hardly eliminate or correct the State's constitutional violations." 169 F.3d at 885.

This view that a civil action to vindicate one's right to equal protection can make little impact is strikingly cynical in an era that can count *Brown v. Board of Education*, 347 U.S. 483 (1954), as one of the most influential decisions. Congress was not required to share that view.

CONCLUSION

For the foregoing reasons, Amicus urges this Court to reverse the judgment of the court of appeals.

Respectfully submitted,

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